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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT
of the
UNITED STATES

October Term 1990

Silas V. Cross,
Petitioner

v.

UNITED STATES, W.D. MALONE,
District Director of U.S.
Internal Revenue Service.
Seattle District,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the standard for equity intervention by an Article III U.S. Constitutional Court into a U.S. income taxation scheme or activity has been adhered to by the lower courts in this case.

2. Whether the Supreme Court's declaration in *Squire v. Capoeman*, *infra*, pp. 9, 26, 28, that:

> "...[I]n ordinary affairs of life *not governed by treaties* or remedial legislation, they [Indians] are subject to the payment of income taxes as are other citizens.",

is the law of the land or not to be followed by the 9th Circuit Court of Appeals?

3. Whether the Oregon Donation (Territory) Act of Aug. 14, 1848 § 14, (9 Stat. 323), incorporating Art. III of the Northwest Ordinance of 1787 (1 Stat. 51) providing:

> "[G]ood faith shall always be observed toward the Indians; their lands and property shall not be taken without their consent."

forbids all possible U.S. taxation (with its related property seizures) of treaty Indians within its territorial scope?

4. Whether the express understanding of the Medicine Creek Treaty Indian signers that federal taxes and related property seizures would never be imposed on their treaty governed activities must, in accordance with the rule of law announced in *Tulee v. Washington*, *infra*, pp. 11, 28, be given effect too?

5. Whether the proven sovereign, paramount, right to the soil, national, character of the title possessed by the Puyallup Tribal Nation in and over its territory as retroceded to it by the United States in August of 1856, precludes and bars U.S. governmental income taxation incursions with related seizure processes into it, and over its tribal nation citizens?

6. Whether Art. I, § 2, Cl. 3, as confirmed by Amendment X, providing for a constitutional immunity or exemption from taxation for Indians living in tribal relations "Indians not taxed" was removed by the adoption of Amendment XVI, U.S. Const.?

7. Whether applying the federal income tax code to Puyallup Indians (Title 26 U.S.C.) without a U.S. President negotiated modification of the Medicine Creek Treaty violates Art. III U.S. Constitution?

8. Whether Petitioner's ward status of record precludes federal income taxation of his treaty governed trading income?

9. Does the full doctrine of *Collateral Estoppel* bear any legal efficacy with respect to certain possible issues herein presented?

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District Director of U.S.
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REFERENCES TO THE RECORD

Arrangements pursuant to S.Ct. Rule 12 have been made with the Clerk of the Ninth Circuit Court of Appeals to forward the entire original record to the Supreme Court. Transcripts (record of pleading, motions, order, etc. - filed originally with the U.S. District Court) are designated as (R, Tr.)

OPINIONS BELOW

The Memorandum Opinion/Decision of the Ninth Circuit Court of Appeals numbered 90-35565 is reproduced in Appendix B, *infra* A-13-17.

The Memorandum Opinion of the U.S. District Court numbered C-90-5077 for the W.D. of Washington is reproduced in Appendix C, *infra*, A-18-21.

JURISDICTION

The date of the judgment of the Court of Appeals for the Ninth Circuit hereby sought to be reviewed is March 22, 1991. The date of its official entry is the same.

The jurisdiction of the Supreme Court is involved under the authority of 28 U.S.C. § 1254 as further implemented by S.Ct. Rule 10.

The Supreme Court of the United States itself fully possesses

the necessary jurisdiction subject to the exercise of its high judicial discretion to issue a "Writ of Certiorari" as prayed for. Petitioner has been denied by the high Court of Appeals for the Ninth Circuit a full decisional process on certain issues which it erroneously or unfairly or both deemed it had decided against Petitoner in another case, and had failed completely to "come to grips" with the legal reality of the sole issue it regarded as justiciable by it. *Viz: the sovereign, right to the soil, status of Petitioner's Tribal Nation's territory.* Thus rendering unto Petitioner a gross injustice, and inequity which he is compelled to turn to the highest Court for relief from. The Court of Appeals has most mistakenly ignored the fact that at no time in the past has Petitioner ever raised that issue of law governed by *Tulee v. Washington, infra*, p. 11, which requires legal effect in Indian treaty interpretation be given to the express understanding of the Indian Treaty signers at treaty time. In this case it was the clear understanding of the Indian treaty signers at treaty time that absolutely no United States government permits or *taxes* would ever be imposed upon their trading related activities, but a geographical limitation on trade would be by Art. 12, Medicine Creek Treaty. (R.Tr. 9, p. 5), (Appendix F, p. A-45). This therefore amounts to a most serious deprivation of Petitioner to the benefit of the rule of both national and international law as justly ordained upon the highest of reason and soundest of wisdom.

Further serious deprivations of benefit of rule by law by the Court of Appeals manifesting gross injustice to the Petitioner and his cause, concern that revenue clause of the U.S. Constitution, Art. I, § I 2, Cl. 3, which expressly excludes Indians living in tribal relations, "Indians not taxed," from U.S. taxation consistent with the powers and practices of the original States which created the National government. Their creation however being subject to Amendment X, U.S. Const. as declared in the case of *Martin v. Hunter's Lessee, infra* p. 24. This issue was never raised before this case by Petitioner and therefore under no theory should he have been *estopped*. Furthermore, "The Oregon Donation

(Territory) Act" of 1848 (9 Stat. 323) which governed the essential term of negotiations acceptable to the U.S. Congress, with the Indians of Medicine Creek, Washington Territory forbade forever any U.S. government taking of their property without their consent. It also prescribed the eternal condition of observing good faith towards the Indians. The Court of Appeals simply ignored this precise issue duly and properly put before it by Petitioner. See "Extract from Appellant's Brief 'Statement of Issues...' " (Appendix H, p. A-58).

THE CONSTITUTIONAL PROVISIONS, TREATY AND STATUTES INVOLVED

United States Constitution

Article I, § 2, Cl. 3 ("Indians not taxed").

Article VI (Treaty is supreme law of the land).

Amendment 10 (Powers not granted are reserved)

Amendment 14 ("Indians not taxed" not subject to complete jurisdiction of the United States).

Amendment XVI (Requirement for taxes apportionment removed).

Federal Statutes Involved are:

1 Stat. 51 Art. III (Northwest Ordinance of 1787), Appendix A *infra* p. A-12.

9 Stat. 323 (Oregon Donation Act of 1848), Appendix A *infra* p. A-12.

10 Stat. 1132 (Medicine Creek Treaty of 1854), Appendix A *infra* pp. A-1-10.

18 U.S.C. §§ 2341, 2342 (Contraband Cigarettes Trafficking Act of 1978).

26 U.S.C. § 1(c)(d). Tax Imposed. Appendix A *infra* p. A-11.

26 U.S.C. § 61(a). Gross Income. Appendix A *infra* p. A-11.

26 U.S.C. § 7421(a). Prohibition of suits to restrain assessments or collection. Appendix A *infra* p. A-11.

26 U.S.C. § 6211(a)(c)(d). Definition of deficiency. Appendix A *infra* p. A-11-12.

26 U.S.C. § 6212(a). Notice of Deficiency. Appendix A *infra* p. A-12.

STATEMENT OF CASE

1. Nature of Claim; Federal Jurisdiction.

This case began in the U.S. District Court for the Western District of Washington by Complaint of Petitioner for declaratory and injunctive relief against a threatened assessment of income taxes by the Internal Revenue Service (R.Tr. 1 pp. 1-6), (Appendix D *infra* pp. A-22-34); that no legal *possibility* of an income tax owing was present, and that he would otherwise be irreparably harmed, and that no adequate remedy at law existed.

Accordingly the U.S. District Court as an Article III, U.S. Constitutional Court has an equity jurisdiction, coupled with 28 U.S.C. § 1331 federal question jurisdiction over all federal agency actions notwithstanding the provisions of the "Anti-Tax Injunction Act" 26 U.S.C. § 7421(a). This jurisdiction was not denied by the U.S. District Court, but it failed to exercise it in accordance with related laws and high court precedents designed to secure solemn Indian treaty obligations and the related honor of the United States, with its interest in the proper management of its high affairs with aboriginal tribes and persons.

2. Essential Facts

Petitioner is a non-competent, restricted Indian citizen/member of the Puyallup Indian Tribal Nation, itself a signatory party to the Medicine Creek Treaty of 1854 (10 Stat. 1132). It was presumed by the Respondents hereinafter referred to as the "I.R.S." that Petitioner was trading and selling in cigarettes in the years of 1977, 1978 and 1979 and deriving a profit therefrom within the Puyallup Tribal Nation's territory (reservation) on a 5/8 acre tract of land specifically in trust with the United States under 25 U.S.C.

§ 465. Petitioner's "on reservation" cigarettes trade is itself a treaty governed activity and is clearly a non-ordinary affair of life and U.S. citizenship because of its express exclusion from the scope of the "Contraband Cigarettes Trafficking Act" (18 U.S.C. §§ 2341, 2342 *et seq.*) as declared in the legislative history of that Act. (H.C.R. 95-1778 pp. 5537-5538; S.R. 95-962 p. 5520, Cong. Rec. Vol. 124 (1978)). See Appendix E p. A-35-39.

Petitioner's Medicine Creek treaty signing ancestors expressly possessed the understanding at treaty time that no U.S. government permits or *taxes* of any type would ever be imposed upon their trading activities. See "Affidavit of Barbara Lane Ph.D." Northwest Indian Anthropologist, p. 5 thereof, Appendix F p. A-45. (R.Tr. 9). Art. 12 Medicine Creek Treaty (Appendix A p. A-6) specifically mentions and expresses a single limitation or imposition on Indian trade, that being one which is geographical in nature only. This is the only imposition on their trade that the Indian treaty signers understood there would be at treaty time. It was not until the mid 1970's that the "I.R.S." began to assert taxes upon Puyallup Indians' "on-reservation" trading activities.

On December 26, 1854, by Art. 1 of the Medicine Creek Treaty the tribes (including the Puyallups and Nisquallies) formally ceded to the U.S. government all of the land area over which they claimed an aboriginal, sovereign, right to the soil title.

Out of this grant or cession of the entirety of their land, by Art. 2 of the Medicine Creek treaty two very small tracts of land were deemed reserved for the present use and occupation of the Puyallups and Nisquallies respectively. Upon finding out they had been tricked and the same not being redressed, tribal warriors of both tribes went into an "all out" war with the U.S. military in the area to retake and secure the actual core area of their original or traditional homeland which contained their main village sites, fishing sites, horse pasturage sites, and waterways. During the local treaty war of 1855-1856, tribal warriors successfully retook by force of arms, with large casualties on both sides, their original core traditional homeland areas and occupied the same, to the

complete exclusion of opposing U.S. forces. Non-combatants on both sides secured refuge from the war at Fox Island under the authority of U.S. forces. The laws of the United States were completely suspended in the said traditional areas occupied by victorious tribal warriors. Peace was re-established throughout the whole lower Puget Sound region when the traditional home land areas as demanded by the warring tribes were *retroceded* to them at the Fox Island Peace Council of Aug. 5, 1856, later confirmed by U.S. Executive Order in January of 1857. The Puyallup Tribal Nation's *retroceded* aboriginal territory has to this date not been reconquered by or receded to the United States and thus is not reposed in the Public, or National Domain of the United States. Appendix D, Paras. 2.12 and 2.13, pp. A-31-32.

For a full blown mixed fact and law "dissertation" of said local treaty war of 1855-56, see "Excerpt from 'Appellant's Brief' to the Court of Appeals". Appendix G pp. A-47-57. Facts of *record* are also recited in Appendix I pp. A-59-67 (R.Tr. 10 pp. 1-11)

REASONS FOR GRANTING WRIT

1. This case specifically raises legal and equitable issues which arise in the application of the ruling in the case of *Miller v. Standard Nut Margarine Co.*; 284 U.S. 498, 510, 76 L.Ed. 423, 430, 52 S.Ct. 260 (1931):

> "This is not a case in which the injunction is sought upon the mere ground of illegality because of error in the amount of tax. The *article is not covered by the act*. A valid...tax could by no legal possibility have been assessed against Respondent and therefore the reasons underlying Sec. 3224 [now 26 U.S.C. Sec. 7421(a)] apply if at all with little force." (Emphasis added.)

The *Miller* court also found and ruled (as also to that of Petitioner's situation) that:

> "It requires no elaboration of the facts found to show that the enforcement of the act against Respondent would be ar-

> bitrary and oppressive, would destroy its business, ruin it financially and inflict loss for which it would have no remedy at law. It is clear that, by reason of the special and extraordinary facts and circumstances Sec. 3224 [26 U.S.C. 7421(a)] does not apply. The lower courts rightly held Respondent entitled to the injunction."

Petitioner's claim for equitable relief does not relate to some assertion by him that there is an illegality because of an error in the amount of tax. Instead Petitioner pleads for exceptional equity relief upon well founded allegations, *admitted as true*, that his treaty governed cigarettes selling operation, *on reservation*, is not possibly covered by the whole of federal tax code as a matter of Constitution (Art. VI), treaty law (10 Stat. 1132), and other related law. (Appendix D paras 2.3 and 2.4, pp. A-27-28.) In the circumstances an imposition of a federal income tax assessment would be arbitrary and extremely oppressive as in direct flagrant violation of Petitioner's vested treaty governed right of immunity from federal taxes, and Petitioner's citizenship status in the Puyallup Indian nation which holds territory retroceded to it by the U.S. government in absolute, sovereign, right to the soil title over which U.S. taxation jurisdiction could not possibly obtain without tax convention or by re-conquest. None of these have to date occurred. Furthermore the federal income tax code expressly rejects any application to overcome a pre-1954 treaty obligation *of the U.S.* (26 U.S.C. (7852(d)(2)). Accordingly the U.S. District Court had subject matter jurisdiction over Petitioner's cause of action for declaratory and injunctive relief notwithstanding the federal tax "Anti-Injunction Act" 26 U.S.C. § 7421(a). As in the *Miller v. Standard Nut Margarine* case *supra*, but to a much stronger degree in Petitioner's case, special and extraordinary circumstances compel judicial intervention immediately because no possibility of federal income taxation jurisdiction exists. This is especially so in this case because the assessment of income taxes begins a process (a serious threat in itself) if carried to its logical outcome would not only destroy Petitioner's business, but

even more importantly would absolutely and devastatingly destroy Petitioner's treaty vested right or immunity to be free of, or from, United States government taxes of any species, on his trading profits earned within his tribal nation's sovereign, right to the soil territory or from treaty related and governed activities, or both.

In *Miller v. Standard Nut Margarine, supra*, the collection of federal taxes was permanently enjoined on the ground that they were not, in law, and fact covered, or within the scope of the Federal Tax Code of the time, at all. And in additon any collection of these would destroy "Standard Nut Margarine's" business. As would the same happen to the Petitioner (See Appendix D, para 1.8, p. A-26).

To like effect, under the principle of *Standard Nut Margarine, supra*, is the case of *Enoch (Dist. of Int. Rev.) v. William Packing Co. and Navigation Co.*, 370 U.S. 1, 8 L.Ed. 2d 292, 82 S.Ct. 1125 (1962). However in this case the court was concerned that: "the record before us clearly reveals that the Government's claim of liability [against William Packing Co.] was not without foundation." This was so, because the William Packing Co. claim that its activity was beyond the scope of the Federal taxing statute involved was not provable at all. There was a strong likelihood that the activity was in fact inclusive within the scope of the pertinent tax law challenged. Thus the test of *Standard Nut Margarine*, was not met. Petitioner's case, however rests upon clear facts and circumstances that show no federal income taxation of him is *even* remotely possibly. In fact on the sovereign, right to the soil territory issue Petitioner's situation is instantly comparable to that of the Russian Ambassador in Washington, D.C. who may have undertaken to sell fur hats for his profit to persons purchasing the same from within the Russian embassy compound. Surely the national territory status of his embassy grounds would bar or forbid extension of U.S. taxation jurisdiction over it, and himself as a national citizen of it, acting within it, subject to his nation's treaty status with the United States. Clearly Petitioner

has been denied the benefit of this basic rule of national jurisdiction to which he is entitled.

2. It is sensibly clear from the Supreme Court's general declaration in *Squire v. Capoeman*, 352 U.S. 1, 8, 100 L.Ed. 883, 76 S.Ct. 611 (1956) that:

> "...[I]n ordinary affairs of life, *not governed by treaties* or remedial legislation the [Indians] are subject to the payment of income taxes as are other citizens."

Therefore since Petitioner's cigarettes *trade* is directly and exclusively governed by his Tribal Nation's Treaty with the United States (Medicine Creek Treaty of 1854). And since it has been pronounced in the legislative history of the "Contraband Cigarettes Trafficking Act" (18 U.S.C. §§2341, 2342, et seq.) (H.C.R. 95-1778, pp. 5537-5538; S.R. 95-962, p. 5520, Cong. Record Vol. 124 (1978), Appendix E p. A-36 & 37) that treaty Indians are to be congressionally unaffected by otherwise severe criminal sanctions, which otherwise act upon non-treaty Indian cigarettes sellers. Nothing could be clearer evidence as a matter of law that Petitioner's cigarettes selling operation in the circumstances of *record* is not an ordinary affair *of life in the United States* or of U.S. citizenship. It must therefore follow that no income taxation of Petitioner's "on reservation" trading profits is legally provided for, or possible. Clearly Petitioner has been denied the benefit of the above quoted *Capoeman* rule which the Court of Appeals chose to completely ignore. This rule of *Capoeman* is in line totally with the early Federal-Indian Law precedents of Chief Justice Marshall, best characterized by his opinion in *Worcester v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831). This rule as basic and simple as it is explains the *sine qua non* of Petitioner's treaty status and thus deserves the attention of the highest court of the United States, even over thousands of other well founded prayers for a Writ.

3. The Medicine Creek Treaty of 1854 has a certain integral legal background which is fully explained in the Northwest area, famous "Judge Boldt" decision. *United States ex rel Certain Tribes*

v. State of Washington, 384 F. Supp. 312 (1974); at pages 353 & 354: (Affirmed in *U.S. v. Washington*, 520 F.2d 676 (9th Cir. 1975))

> "By the Act of August 14, *1848, 9 Stat. 323*, the United States established the Oregon Territory and provided that nothing contained in said act *'shall be construed to impair the rights of person or property* now pertaining to the Indians in said territory, *so long as such rights shall remain unextinguished by treaty* between the United States and such Indians...' Section 14 of that act extended to the Oregon Territory the Northwest Ordinance of *1787, 1 Stat. 51*, Note a, which provides that *'good faith shall always be observed toward the Indians; their lands and property shall never be taken without their consent.' " (Emphasis added).
>
> *"By an Act of June 5, 1850, 9 Stat. 473*, Congress authorized the negotiation of treaties with Indian tribes in the Oregon Territory...for extinguishing their claims to land lying west of the Cascade Mountains." (Emphasis added).

Can it be rationally disputed that the treaty negotiations policy pursued by U.S. treaty representatives at Medicine Creek in 1854 with the "Medicine Creek" Nation is absolutely presumed to be in conformance with the policy of the Oregon Donation Act of 1848; incorporating by reference as it does Art. III of the "Northwest Ordinance" of 1787 *supra*? Clearly the said Oregon (Territory) Donation Act provisions are in *pari materia* with the Medicine Creek treaty of 1854 (10 Stat. 1132), thereby actually inhering into it as the fundamental policy and solemn commitment of the United States for the life of the Treaty. Any possibility of an applicable Federal tax with respect to treaty governed trading activities would be a nonconsensual taking of the treaty Indians' property and therefore forbidden by § 14 of the Oregon (Territory) Donation Act of 1848. This basic law or Ordinance for the structuring of relationships with respect to the several Indian "Nations" has obviously never been overruled, nor does it lend itself to be overruled.

4. The subject matter of trade is specificaliy brought up and dealt with in the Medicine Creek Treaty, by Art. 12, (10 Stat. 1132) thus laying the basis for judicial inquiry as to its scope, and the understandings of the Indians about its several facets, one of which certainly is a specific, clear, historical (at treaty time) understanding that no federal taxes could ever apply to Medicine Creek treaty trading related activities.[1] The case of *Tulee v. State of Washington*, 315 U.S. 681, 684, 685, 86 L.Ed. 1115, 62 S.Ct. 862 (1942) declares the precise rule of both U.S. Supreme Court responsibility in regard to, and the effect to be given to, the express terms of an Indian treaty provision. (Petitioner's case is about *trading* as mentioned in the Medicine Creek Treaty Art. 12. As reasonably amplified, Art. 12 discloses a related understanding by the Indians at treaty time that their trading activities were to be free of all U.S. permits and *U.S. taxation* for all time.) (Appendix F p. A-45)(R.Tr. 9 Ex. a p. 5).

> "It is our responsibility to see that the terms of the treaty are carried out, so far as possible, *in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interest of dependent people..." (Emphasis added).*

In reaching the foregoing ruling the Tulee court explained the importance of the Indian treaty signers' intentions as set out in the record before it thusly:

> "From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with immemorial custom of their tribes".

If anything, the actual, express understandings of the Medicine

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[1]This issue had never been raised or decided previously by any court involving Petitioner. Therefore no suggestion of "collateral estoppel" is possibly pertinent.

Creek Indian signers at the treaty council of Medicine Creek in 1854 about their reserved trading activities to be conducted without U.S. licenses, or permits or U.S. *taxes* thereon was just as strong and is even more clear by the unrefuted evidence of record in this very case.[2] See Appendix F p. A-45 (R.Tr. 9 Ex. A, p. 5) which establishes the ultimate legally operative fact through Northwest Indian Anthopology expert Barbara Lane, Ph.D. that:

"No provision was inserted to the effect that Indians would be required to have licenses or permits to trade or that *their trading would be taxed*. The most reasonable conclusion is that the Indians would have understood their trading activities to be secured by the treaty and that *no other* limitation other than the geographical restriction in Article 12, were intended." (Emphasis added.)

Clearly Petitioner was entitled to an application of the *Tulee* case rule which would dictate that no Federal income taxation is legally possible. Instead the Court of Appeals patently ignored completely the issue raised by *Tulee* as well as the other issue integral therewith arising under the doctrine explained in *U.S. v. Winans*, 198 U.S. 371, 49 L. Ed. 1089, 25 S. Ct. 662 (1904) that:

> "The treaty was not a grant of rights to the Indians but a grant of rights from them — a reservation of those not granted."

Clearly any process of proper Medicine Creek Treaty interpretation for any and all purposes (U.S. taxation included to be fair) must take into account under the *Winans* rule that absolutely no

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[2] It should be noteworthy that the U.S. government's only interests and intentions present and future in the Medicine Creek Treaty of 1854 was to obtain pure and simple a land cession of 2,600,000 acres from the Tribal Nation Indians. No thought of infringment upon their otherwise recognized "nation" sovereignty was ever contemplated. It is clear that this was all the U.S. government asked for and the only thing the Indians were giving up for all time. This is clearly confirmed by the Oregon Donation Act of 1848 (9 Stat. 323) incorporating Art. III of the Northwest Ordinance of 1787 (1 Stat. 51) which related to, preceded, and governed the appropriate terms of the Medicine Creek Treaty.

right or power was ever granted to the U.S. government to tax Treaty "on reservation" trading profits of the Indians. All U.S. government taxation of whatever species as under the revenue clauses of the U.S. Const. then, or as later amended, were barred forever from application as a primary legal *consideration* for the land cession itself by the Indian treaty signers.

The *Winans* case was applied as controlling in the exercise of the Supreme Court of Wisconsin's, highest reasoning wherein it was held in *State v. Johnson*, (Wisc.) 249 N.W. 285 (1933):

> *"While the treaty entered into did not specifically reserve to the Indians such hunting and fishing rights as they had heretofore enjoyed*, we think it reasonably appears that there was no necessity for specifically mentioning such hunting and fishing rights with respect to the lands reserved to them. At the time the treaty of 1854 was entered into there was not *'a shadow of impediment upon the hunting rights* of the Indians on the lands retained by them.' *The treaty was not a grant of rights to the Indians, but a grant of rights from them* — a reservation of those not granted. *U.S. v. Winans*. We entertained no doubt that the rights of the Indians to hunt and fish upon their own land continued." (Emphasis added.)

Also the *vested* nature of retained treaty rights are confirmed by the holding in the case *United States v. State of Washington*, 520 F.2d 676, 692 (9th Cir. 1975):

> *"Rights under the treaties vested with the tribes at the time of the signing of the treaties."*

At the time of the Medicine Creek Treaty of 1854 there was not a "shadow of impediment" upon the Medicine Creek Treaty citizen/members' vested right of freedom and absolute immunity from federal taxation of all species. Furthermore it is obvious that those "rights under these treaties", are not *solely* those which are expressly and precisely written into the treaty document itself. *U.S. v. Winans*, *supra*. See also *State v. Johnson*, *supra*. Thus it is clear that the Medicine Creek Treaty Indians never granted to the U.S. government any power or right to impose taxes on

them under any circumstances. The notion that a material provision to a treaty could have some how been unilaterally held back to be operative in the U.S. Government's favor at a later date is dispelled by the case of *New York Indians v. United States*, 170 U.S. 1, 11, 42 L.Ed. 927, 934, 18 S.Ct. 531 (1899) which provides;

> *"There is something, too, which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or an Indian tribe, a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case may demand it."* (Emphasis added.)

5. The Territory retroceded to the Puyallup Indian nation by the Fox Island Council of 1856 as a condition for ending the treaty war of 1855-56 comprises the Puyallup Tribal Indian Nation's sovereign, *right to the soil* territory over which the United States of America could have no taxing jurisdiction. The taxing arm of the United States is excluded from Puyallup Indian Nation territory, because it has a full national, paramount, right to the soil character of its own; together with that treaty time understood and retained right of freedom or immunity from U.S. taxes of any species, then or thereafter existent. (Medicine Creek Treaty of 1854, Fox Island Council retrocession of 1856, Executive Order U.S. President Franklin Pierce 1857.) Therefore Petitioner, a tribal citizen residing within the territory of his own wholly *sovereign*, national homeland is *wholly immune* from United States taxation on the trading activities he conducts within it. This is certainly no different than the situation of the Canadian citizen selling goods in Canada, or a French citizen in France doing the same, obviously free of U.S. income taxation on their trading profits.

In the case of *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983), the Court declared the basic truth regarding the involvement of Puyallup Indian tribal citizens in *the war* with the United States military and American settlers in 1855, and 1856 as follows:

> *"...PUYALLUP INDIANS CONCEIVED OF THEIR TERRITORY AS THE PUYALLUP RIVER AND THE SURROUNDING LAND..."* (Emphasis added.)

At the Fox Island Council of 1856 which marked the end of the Indian War of 1855-56, it was determined by that Council upon the demands of Puyallup Indian warriors that the small Puyallup Indian territory was to be greatly enlarged by a U.S. government retrocession to the Puyallups of their traditional homeland as then encompassed within Article 1 of the Treaty of Medicine Creek as a prior grant (cession to the United States). The Court said at page 1260:

> "The parties at the Fox Island Council thus agreed to expand the Puyallup Reserve to include the lower portion of the Puyallup river. The Commissioner of Indian Affairs and the Secretary of Interior recommended that the agreement be adopted. President Pierce approved those recommendation in an Executive order of January 20, 1857. Those recommendations show that the Reserve *was expanded pursuant to Article 1 of the Treaty of Medicine Creek (10 Stat. 1132). The expanded Reserve included the property involved in this case."* (Emphasis added.)

Thus the territory originally ceded by the Puyallups was retroceded to them as a war reparation out of the public domain of the United States in August of 1856, confirmed by U.S. Presidential Order in 1857. The same having originally gone into public domain of the U.S. by said Article 1, Medicine Creek Treaty in 1854.

The land retroceded[3] to the Puyallup Indian Nation did not have the same status as land which would be held for mere *exclusive*

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[3]"The term retrocede would seem to limit it to what had been before ceded; such is the natural and most obvious signification of the term. In this sense it is used by this court in *Johnson v. McIntosh*, (8 Wheaton 584), where it is said, 'France ceded Louisiana to Spain, and Spain has since retroceded the same country to France.' " *Foster and Elam v. Neilson*, 27 U.S. 253, 267 (1829).

use and occupancy. To the contrary, that land, which the Puyallup Indian Nation gained by the Fox Island Council peace pact of 1856 was some of their aboriginal, right to the soil, traditional home land and territory over which the Puyallups had always exercised sovereign dominion, but for the brief period of December 1854 to August of 1856, when the United States held the sovereign dominion (jurisdiction over, or right to, the soil title) by a treaty time overreaching device which directly caused the local Indian treaty war of 1855-56 to ensue. For a fuller discussion of facts see "Excerpt from Appellant's Brief to the Court of Appeals," Appendix G, pp. A-47-57. Also Appendix I, "Affidavit of Silas V. Cross", pp. A-59-67.

The right of discovery of the Northwest Coast land area as exercised by the United States and other "civilized nations" was not to be construed as a claim superior to the right to the soil title of Indian tribes or nations and their inhabitants in the lands or territory they held. A full exposition of this right of discovery and the right to the soil is found in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (1823), in which Chief Justice Marshall wrote at 573:

> "This principle was, that discovery gave title to the government by whose subjects, or by those authority, it was made, against all other *European Governments*, which title might be consummated by possession. The exclusion of all other Europeans, necessarily gave to the Nation making the discovery *the sole right* of acquiring the *soil for nations* and establishing settlement upon it. It was a right with which no European could interfere. it was a right with which all asserted for themselves, and to the assertion of which, by others, all assented. *Those relations which were to exist between the discoverer and the natives were to be regulated by themselves...*" (Emphasis added.)

The United States of America, a sovereign nation, espoused a policy and belief that Indian tribes were to be treated as Nations, who owned paramount, sovereign, jurisdiction over the soil

(right to the soil) title to their aboriginal tribal lands, (except for most all tribes east of the Mississippi River, whose sovereign, right to the soil title to their occupied land had been extinguished by the British "sword"), whose status and interest was to be determined by land cession Treaties. Indian sovereign title to land acquired by conquest by the United States' predecessor(s) in interest would be regarded by the United States as having been already extinguished when United States succession to these lands took place. In *Johnson v. McIntosh*, *supra*, the Court explained this: (At pages 588 & 589).

> *"...Conquest gives a title which the Courts of the Conqueror cannot deny...*The *British government, which was then our government and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians within the chartered limits of British Colonies...These claims have been maintained and established as far West as the River Mississippi by the sword.* The title to a vast portion of the lands we now hold, originates in them." (Emphasis added.)

The United States' claim to the Northwest Coast Territory was not a claim of owning title to some of all of the Indian territory, but was a claim of exclusive discovery only giving it the exclusive right to acquire by conquest or treaty arrangement aboriginal, right to the soil title.

In 1866 the Congress of the United States by record of debate on adoption of the 14th Amendment very authoritatively in the United States Senate, by the illustrious Senator Howard, explained the International law view of the U.S. government with respect to the ownership status of aboriginal Indian lands within the scope of United States "discovered" territory. At page 2895 of the Congressional Globe 1st session, 1866, he said:

> "It has been the habit of the government from the beginning to treat with the Indian tribes as sovereign Powers...They have a national independence. *They have an absolute right to the occupance of the soil upon which they reside; and the*

> *only ground of claim which the United States has ever put forth to the proprietorship of the soil of an Indian territory is simply the right of preemption; that is, the right of the United States to be the first purchaser from the Indian tribes.* We have always recognized in an Indian tribe the same sovereignty over the soil which it occupied as we recognize in a foreign nation of power in itself over its national domains. They sell the lands to us by treaty, and they sell the lands as the sovereign Power owning, holding, and occupying the lands. (Emphasis added.)

Also Chief Justice Marshall in *Johnson v. McIntosh*, *supra*, explained the U.S. view as to the status of sovereign, *right to the soil* title to land held by aboriginal natives and their tribes not yet affected by British claims and pretensions of conquest by the sword in this very way: (At page 593)

> *"The title of the Crown, whatever it might be, could be acquired only by a conveyance from the Crown.* If an individual might extinguish the Indian title, for his own benefit, or in other words, might purchase it, still he could acquire only that title. Admitting their power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is part of their territory, and is held under them, by a title dependent of their laws. The grant derives its efficacy from their will...*The person who purchases lands from the Indians within their territory, incorporated himself with them, so far as respects the property purchased; holds their title under their protection and subject to their laws...*We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract in severalty. As such a grant could not separate the Indian from his nation, nor give a title which our courts could distinguish from the title of his tribe, as it is might still be conquered from or ceded by his tribe." (Emphasis added.)

Thus it is clear that sovereign, *right to the soil* title to land ("title of the Crown") held by a nation including any U.S. recognized Indian tribal nation is a fact recognized by the U.S. government as controlling. The foregoing *while being absolutely definitive* is of course only true where the tribal nation owns its territorial land base *in sovereignty* with *jurisdiction over the soil* as does the Puyallup Indian Tribal Nation because of the Fox Island Council retrocession. If tribal nation land is owned in *use and occupancy only* as most tribal nation land or territory is within the United States, then the above principles are of no effect because the United States by treaty or conquest has gained the sovereign, *right to the soil* title itself.[4] Use and occupancy Indian land is wholly within the public domain of the United States, whereas Puyallup Indian Tribal Nation land is not, anymore than Canadian land is, because of its sovereign, right to the soil character.

The Court of Appeals completely avoided adjudication of the reality and wisdom of *Johnson v. McIntosh*, in this above regard to Petitioner's great injury. The Court of Appeals simply recited a *non sequitur* ruling that the small parcel of property which the Puyallup tribe as an entity claimed it owned in the case of *Puyallup Tribe v. City of Tacoma*, *supra*, was in a trust status with the United States, thus avoiding Petitioner's claim that all of the Puyallup Tribal Nation's territory was sovereign, right to the soil territory over which it thus held an exclusive National jurisdiction. The same national title having never been extinguished by U.S.

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[4] According to Felix Cohen "Handbook of Federal Law," p. 89: *"The principal sources of congressional authority over Indian affairs are summarized by a leading authority in these terms:"*

> *'...[T]he regulations of Indians has gone much fuirther [than the constitutional bases therefor.] Much power has been exercised because the whole Indian country, except the few Eastern reservations was formerly part of the national domain with exclusive title and sovereignty (except...restricted by Indian occupancy) inthe national government.'*

See Rice, The Position of the American Indian in the Law of the United States (1934) 16 J. Comp. Leg. 78.

conquest or tribal nation recession, since the U.S. retrocession to the Puyallups in 1856.

In the case of *The United States v. Rice*, 17 U.S. (4 Wheat.) 246, 4 L.Ed. 562 (1819) the high Court was compelled to give an international law effect to the reality of a hostile military occupation of a certain portion of the U.S. national, right to the soil territory known as "Castine" located within the United States' designated District of Maine. The Court held that the occupation was so pervasive that United States revenue laws and other laws were completely suspended during the hostile takeover by the *military and naval forces of Great Britain*. Justice Story ruled that in 1814:

> "Castine was captured by the enemy and remained in his exclusive possession under the...control of his military...forces until...the treaty of peace in 1815."

A parallel situation occurred in the lower Puget Sound region in 1855-56, the enemy of the United States obviously being the Puyallup and Nisqually Indian tribes who were intent upon retaking by force of arms certain traditional tribal land areas back to their sovereign, right to the soil status and control. (Appendix D, pp. A-30-32.)(R.Tr.1 p. 11-13.) Justice Story further ruled:

> "...By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. Thus sovereignty of the United States over the territory was, of course suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors."

The ferocity of the military engagement undertaken by the Puyallup Indian warriors caused the evacuation of the white settlers and the full retreat of the U.S. military force to nearby Fox Island and Fort Nisqually. Thus the part of the ceded territory with Indian village sites and waterways was pervasively conquered, and occupied to the fullest extent by Indian tribal warri-

ors through force of arms. Of course the laws of the United States in this occupied territory were suspended with respect to everyone during this time. This very same occupied territory was never returned into the public domain of the United States as "Castine" was, it being the subject of the Fox Island Council peace pact and land retrocession, whereby sovereign, jurisdiction over, right to the soil title to this conquered and occupied territory was confirmed as being in the Puyallup Indian Tribal nation. Thus it was taken out of the public domain of the United States not to ever return thereto in the most absolute sense. Justice Story further ruled:

> "By the surrender the inhabitants passed under a temporary allegiance to the British government and were bound by such laws, and such only, as it chose to recognize."

The same was true in the Puyallup Indian conquered territory as well. Justice Story further ruled:

> "Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port....[G]oods imported were in no correct sense imported into the United States..."

In the case entitled *"The Diamond Rings"*, 183 U.S. 176, 178, 46 L.Ed. 138, 22 S.Ct. 59 (1901) the court declared:

> "...Nor could territory be foreign and domestic at the same time."

Puyallup Indian Tribal Nation territory as it was enlarged by the said retrocession is foreign, not domestic territory with respect to the United States government. It has never been reconquered by the U.S., or receded to the U.S. by the Puyallups. Therefore the U.S. government has no rational and reasoned right, power, or excuse to extend its taxation jurisdiction over the rightful national tribal inhabitants thereof. One of which is the Petitioner in a prayer for a Writ.

6. An express United States constitutional immunity from federal income taxation exists in Petitioner's favor pursuant to Article I, § 2, cl. 3 of the U.S. Const.:

> "...[D]irect taxes *shall be apportioned among the several states* which maybe included within this union, *according to their respective numbers* which shall be determined by adding...the whole number of free persons...*excluding Indians not taxed...*"

Federal direct taxes were to be imposed on free persons within the States of the Union expressly excluding tribal Indians living in tribal relations. I.e. "Indians not taxed".[5]

This provision manifests the U.S. Constitution signers' original intentions that the federal government should not, could not, and would not, tax tribal Indians until such time as they abandoned their tribal relations, then becoming an Indian taxed by the very State of the Union he made himself a part of. The XVI Amendment to the U.S. Constitution was designed *only* to remove the necessity for apportionment among the States, with respect to impositions of income taxes upon property derived income, *Brushaber v. Union P.R. Co.*, 240 U.S. 1, 17, 60 L.Ed. 493, 501, 502, 36 S.Ct. 236 (1915). The remainder of Art. 1, § 2, cl. 3 as amended by the 16th Amendment is the constitutional basis for the federal income tax but as shown, it is expressly provided for that "Indians not taxed" i.e. those living in tribal relations are *excluded*. In *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 112, 60 L.Ed. 546, 36 S.Ct. 278 (1916) the court explained:

> "The Sixteenth Amendment conferred no new power of taxation..."

In 1947 the Congress consistent with the intentions of the U.S. Constitution signers to forbid federal taxation of Indians living in tribal relations i.e. "Indians not taxed," adopted the same position in its "Buck Act" (4 U.S.C. § 109) wherein taxation of Indians not otherwise taxed, was confirmed as forbidden in these

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[5] An Indian tribal citizen (or reservation Indian) has been historically referred to as both an "Indian not taxed" and an Indian living in tribal relations with the former being expressly interpreted to mean the latter. *Elk v. Wilkens*, 112 U.S. 94, 99, 100 (1884).

terms:

> (4 U.S.C. § 109) "Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any *Indian not otherwise taxed*."

The phrase "Indians not taxed" is obviously not out-moded from its use in the U.S. Constitution in 1787. When the 14th Amendment § 2, U.S. Const. was adopted in 1866, the phrase "excluding Indians not taxed" was again used. See Felix S. Cohen's *Handbook of Federal Indian Law*, 1982 Ed. p. 388:

> "Only those few Indians who had severed their tribal relations and individually joined non-Indian communities were to be considered subject to *ordinary* laws in a manner that made it appropriate to count them in the apportionment of direct taxes or representation in Congress." (Emphasis added.)

Obviously the Court of Appeals should have given effect to the "enshrined" intentions of the U.S. Nation's founding fathers who in 1991 are still revered.

Furthermore it is clear that the only taxation powers that the U.S. government constitutionally possesses are those delegated by the convention of the original States. Those powers which these States did not possess were not delegated to the National government. One of the powers not possessed or exercised by these original States was the taxation of Indians living in tribal relations i.e. "Indians not taxed". Accordingly the U.S. government has no authority whatsoever without the same first being delegated by the States to tax such Indians. Of course it was legally impossible for the original States to delegate a power to tax recognized tribal Indians because they had not this power to begin with. Their only power in this regard would be a conquest, but not all tribes had been so subjected by anyone. The Puyallup Tribal Nation has never been conquered. See excerpt from Professor Rice's authoritative article quoted in Felix Cohen's "Handbook of Federal Indian Law", 1942 Ed. p. 89 which pertinently states:

> "The colonies before 1776 (and the original States therafter)

> often deal with Indian tribes through *political agreements. When in 1787 the Constitution made exclusive grant of treaty power to the national government, these precedents formed a strong basis for national dealing with Indian Tribes...*" (Emphasis added.)

In *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 4 L.Ed. 102 (1816) Amendment X, U.S. Const. was stated and interpreted:

> "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.
>
> The government, then, of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication."

Accordingly this phrase "Indians not taxed" as found in Art. I, § 2 cl. 3 U.S. Const. does operate to Constitutionally dispel taxation of unconquered U.S. recognized Indians living in tribal relations.

7. A unilateral act of the I.R.S. through its agents to modify an existent treaty time understood and retained immunity from U.S. government taxation usurps the exclusive right and power of the President to effect treaty modifications pursuant to Art. II, § 2, U.S. Constitution. In *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319, 81 L.Ed. 253, 57 S.Ct. 216 (1936) it is set forth:

> "[T]he President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; *but he alone negotiates*. In the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."

No limitations or impositions of any kind including taxation upon the Puyallups' (and other Medicine Creek Treaty tribes and bands) retained trading rights existed or were possibly provided for at a later time, except for an express territorial limitation on trade (Art. 12). To further explain the U.S. constitutional scheme involving the U.S. government's position with respect to treaty

Indian tribes and their members, the court in *Native American Church of North America v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959) held:

> "But as declared in the decision herein before discussed. *Indian Tribes are not states*. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have *expressly* been required to surrender them by the *superior sovereign*, the United States."
>
> " 'The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possessed, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.' "

Most obviously the U.S. Congress has never attempted to make any taxing provision of Title 26 U.S.C. expressly applicable to Medicine Creek Treaty governed "on reservation" trading income producing activities. Moreover the *Native American Church of North America* rule, *supra*, is extraordinarily strengthened in its application to the Puyallup Tribal Nation territory and its tribal members therein for the reason that the United States is totally without a "superior sovereign" status with respect thereto as a matter of law and international law in view of the U.S. retrocession to the Puyallup Indian Nation in 1856. Moreover a mere passage by Congress of the federal income tax code (Title 26 U.S.C.) operating as it does in the most general of terms (See 26 U.S.C. §§ 1, 61) would hardly overcome treaty time expressly understood.

retained, immunities from U.S. taxation. In *Cook v. United States*, 288 U.S. 102, 77 L.Ed. 641, 53 S.Ct. 305 (1933) it is declared:

> "A treaty will not be deemed to have been *abrogated* or *modified by a later statute* unless such purpose on the part of Congress has been clearly expressed." (Emphasis added.)

8. Petitoner is a ward of the U.S. government in the precise treaty governed activity he is engaged in. (Appendix D p. A-32)(R.Tr. 1, p. 14). In *United States v. McGowan*, 302 U.S. 535, 82 L.Ed. 410, 58 S.Ct. 286 (1938) the court casts this *light*:

> "...Congress alone has the right to determine the *manner* in which the country's guardianship...shall be carried out..." (Emphasis added.)

In *Perrin v. United States*, 232 U.S. 478, 486, 58 L.Ed. 691, 34 S.Ct. 387 (1914) the court declares:

> "As the power is incident only to the presence of the Indians and their status as wards of the Government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis...On the other hand, it must also be conceded that, in determining what is reasonably essential to the protection of the Indians, Congress is invested with a wide discretion, and its action, unless purely arbitrary must be accepted and given full effect by the courts."

Surely that declaration of great weight and integrity found in *United States v. Rickert*, 188 U.S. 432, 47 L.Ed. 532, 23 S.Ct. 478 (1903) stands as a corollary to the above whereby the court declares in an Indian case that:

> "The power *to tax* is the power to destroy."

In *Squire v. Capoeman*, *supra*, at p. 8 the court affirmed that:

> "...[I]t is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian."

Furthermore should it be deemed pertinent for any reason *Choate v. Trapp*, 224 U.S. 665, 678, 56 L.Ed. 941, 32 S.Ct. 565 (1912) pertaining to an Indian ward determined that:

"...[T]here was nothing in citizenship incompatible with guardianship..."

Congress not the Internal Revenue Service will determine the *manner* of carrying out its obligation and responsibilities of Indian guardianship. *(U.S. v. McGowan, supra)*. Congress surely has not been found by any express or specific act, to have acted arbitrarily to destroy that which it must be otherwise presumed absolutely to uphold and protect in the exercise of its honor and integrity. Thus no federal income taxation requirement upon Indian wards within the scope of their guardianship/wardship relationship is rationally conceivable. Therefore no provisions of Title 26 U.S.C. are possibly applicable to the profits (if any) from Petitioner's treaty governed, "on reservation" trading activities. To hold otherwise in itself, is to tax the ward for the benefit of the guardian, an obviously deplorable breach of an overall trust obligation assumed and owing by the U.S. government to Petitioner.

9. Concerning the doctrine of *Collateral Estoppel:* in *U.S. v. Washington*, 459 F. Supp. 1020, 1083 (1978) it is declared:

"In order for the doctrine of collateral estoppel to apply, all of the following conditions must be present: The issue to be concluded must be the same as that involved in the prior action; the issue must have been raised and litigated, and actually adjudged, in the prior action; the issue must have been material and relevant to the disposition of the prior action, *and it must be shown that the use of the doctrine would not work injustice on any of the parties involved*. Based upon these criteria, collateral estoppel does not apply. *Nickert v. Puget Sound Tug & Barge Co.*, 335 F. Supp. 1162, 163 (W.D. Wash 1971); Moore's Fed. Practice, Vol 1B, pp. 3901, 3907.

Application of the principle of collateral estoppel to the plaintiff tribes in this case would work a *manifest injustice* in the particulars specified in the findings of fact." (Emphasis added.)

It would manifestly be unjust to treat with the 1976 case of Peti-

tioner See *Dillon et. al. v. United States*, 792 F.2d 849 (9th Cir. 1986) which began by his filing a U.S. Tax return for that year, and directly upon the issuance of a "Notice of Deficiency" for 1976 accessed the U.S. Tax Court, by comparing it to the contrary circumstances present for 1977, 1978 and 1979. Petitioner for these latter years has done nothing to invoke U.S. taxation jurisdiction in the first instance. Furthermore, no actual adjudication actually took place in *Dillon* of any of the issues raised in the subject of this Petition. Furthermore issues involving: the doctrine of the *Tulee* case; the sovereign, right to the soil territory of the Puyallup Indian Tribal Nation; U.S. President alone modifies treaties; the prohibition of taxation and relates seizures by the Oregon Donation Act of 1848; and the above quoted rule of *Squire v. Capoeman*, were absolutely not even raised in *Dillon, supra*.

CONCLUSION

On the issue of the continuing phenomenon of Puyallup Indian Nation sovereign, right to the soil territory thereby *per se* excluding any U.S. taxation jurisdiction within it, the case of *Downes v. Bidwall*, 82 U.S. 224, 45 L.Ed. 1088, 21 S.Ct. 770 (1901) is illuminating dealing as it does with the Island of "Porto Rico" the court said (at page 287):

> "...[T]he island of Porto Rico is a territory appurtenant and belonging to the United States, *but not a part of the United States within the revenue clauses of the U.S. Constitution*..."

The Puyallup Tribal Nation does not even belong to the United States although it be appurtenant thereto in a territorial sense only. Further the *Downes* court explained its rationale for the above ruling thusly (at page 269):

> "...[T]he Constitution had no application since it was ordained and established 'for the United States of America', and not for countries outside of their limits."

The Puyallup Indian Tribal Nation is a "country" outside the limits of the United States.

WHEREFORE, Petitioner prays that his application for Writ of Certiorari be granted because in the circumstances of this case *he* received absolutely no due and proper disposition or adjudicaton of the simple and direct legal claims for relief he advanced in his Complaint. Thus Petitioner not having been heard at all in the effect, believes himself fully justified to plead for justice to the highest Court of the United States.

DOUGLAS SULKOSKY
Counsel for Petitioner

APPENDIX A
U.S. TREATY AND STATUTES INVOLVED

Medicine Creek Treaty of 1984 (10 Stat. 1132).

FRANKLIN PIERCE
PRESIDENT OF THE UNITED STATES OF AMERICA
To all and singular to whom these presents shall come, greeting:

Whereas a treaty was made and concluded on the She-nah-nam, or Medicine creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to wit:

Articles of agreement and convention made and concluded on the She-nah-nam, or Medicine creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Issac I. Stevens, governor and superindendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Homamish, Steh-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget's sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

ARTICLE I.

The said tribes and bands in Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest

in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the point on the eastern side of Admiralty inlet, known at Point Pully, about midway between Commencement and Elliott bays; thence running in a southeasterly direction, following the divide between the waters of the Puyallup and Dwamish or White rivers, to the summit of the Cascade mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills, thence northerly, to the upper forks of the Satsop river, thence northeasterly, through the portage known a Wilke's Portage, to Point Southworth, on the western side of Admirality inlet; thence around the foot of Vashon's island, easterly and southeasterly, to the place on beginning.

ARTICLE II.

There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's inlets, and separated from Hartstene island by Peal's passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the She-nah-nam creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement bay; all which tracts shall be set apart and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratifi-

cation of this treaty, or sooner if the means are furnished them. In the meantime, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

ARTICLE III

The right of taking fish at all usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands; *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

ARTICLE IV

In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof three thousand two hundred and fifty dollars; for the next two years three thousand dollars each year; for the next three years two thousand dollars each year; for the next four years fifteen hundred dollars each year; for the next five years twelve hundred dollars each year, and for the next five years one thousand dollars each year; all which said sums of money shall be applied to the use and benefit

of the said Indians under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE V

To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE VI

The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservatios to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

ARTICLE VII.

The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of the individuals.

ARTICLE VIII.

The aforesaid tribes and bands acknowledge their dependence on the government of the United States and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one of or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit and depradations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE IX.

The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore, it is provided, that any Indian belonging to said tribes who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE X.

The United States further agree to establish at the general agency or the district of Puget's Sound, within one year from the ratification hereof and to support for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of the said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employe a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance, to be defrayed by the United States, and not deducted from the annuities.

ARTICLE XI.

The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE XII.

The said tribes and bands finally agree not to trade at Vancouver's island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE XIII.

This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President of the United States.

In testimony whereof the said Issac I. Stevens, governor and superindendent of Indian affairs, and the undersigned chiefs, head-

men, and delegates of the aforesaid tribes and bands, have hereunto set, their hands and seals at the place and on the day and year hereinbefore written.

ISSAC I. STEVENS, [L.S.]
Governor and Superintendent Territory of Washington
QUI-EE-METL, his x mark, [L.S.]
SNO-HO-DUMSET, his x mark, [L.S.]

LESH-HIGH, his x mark, [L.S.]
SLIP-O-ELM, his x mark, [L.S.]
KWI-ATS, his x mark, [L.S.]
STEE-HIGH, his x mark, [L.S.]
DI-A-KEH, his x mark, [L.S.]
HI-TEN, his x mark, [L.S.]
SQUA-TA-HUN, his x mark, [L.S.]
KAHK-TSE-MIN, his x mark, [L.S.]
SONAN-O-YUTL, his x mark, [L.S.]
KL-TEHP, his x mark, [L.S.]
SAHL-KO-MIN, his x mark, [L.S.]
T'BET-STE-HEH-BIT, his x mark, [L.S.]
TCHA-HOOS-TAN, his x mark, [L.S.]
KE-CHA-HAT, his x mark, [L.S.]
SPEE-PEH, his x mark, [L.S.]
SWE-YAH-TUM, his x mark, [L.S.]
CHA-ACHSH, his x mark, [L.S.]
PICH-KEHD, his x mark, [L.S.]
S'KLAH-O-SUM, his x mark, [L.S.]
SAH-LE-TATL, his x mark, [L.S.]
SEE-LUP, his x mark, [L.S.]
HI-NUK, his x mark, [L.S.]
MA-NO-NISH, his x mark, [L.S.]
CHEELS, his x mark, [L.S.]

KNUTCANU, his x mark, [L.S.]
BATS-TA-KOBE, his x mark, [L.S.]
WIN-NE-YA, his x mark, [L.S.]
KLO-OUT, his x mark, [L.S.]
SE-UCH-KA-NAM, his x mark, [L.S.]
SKE-MAH-HAN, his x mark, [L.S.]
WUTS-UN-A-PUM, his x mark, [L.S.]
QUUTS-A-TADM, his x mark, [L.S.]
QUUT-A-HEH-MTSN, his x mark, [L.S.]
YAH-LEH-CHN, his x mark, [L.S.]
TO-LAHL-KUT, his x mark, [L.S.]
YUL-LOUT, his x mark, [L.S.]
SEE-AHTS-OOT-SOOT, his x mark, [L.S.]
YE-TAHKO, his x mark, [L.S.]
WE-PO-IT-EE, his x mark, [L.S.]
KAH-SLD, his x mark, [L.S.]
LA'H-HOM-KAN, his x mark, [L.S.]
PAH-HOW-AT-ISH, his x mark, [L.S.]
SWE-YEHM, his x mark, [L.S.]
SAH-HWILL, his x mark, [L.S.]
SE-KWAHT, his x mark, [L.S.]
KAH-HUM-KLT, his x mark, [L.S.]
YAH-KWO-BAH, his x mark, [L.S.]
WUT-SAH-LE-WUN, his x mark, [L.S.]
SAH-BAT-HAT, his x mark, [L.S.]
TEL-E-KISH, his x mark, [L.S.]
SWE-KEH-NAM, his x mark, [L.S.]
SIT-OO-AH, his x mark, [L.S.]
KO-QUEL-A-CUT, his x mark, [L.S.]
JACK, his x mark, [L.S.]
KEH-KISE-BE-LO, his x mark, [L.S.]
GO-YEH-HN, his x mark, [L.S.]
SAH-PUTSH, his x mark, [L.S.]
WILLIAM, his x mark, [L.S.]

Executed in the presence of us —
M.T. SIMMONS,
Indian Agent.
JAMES DOTY,
Secretary of the Commission.
C.H. MASON,
Secretary Washington Territory
W.A. SLAUGHTER,
1st Lieut. 4th Infantry,
JAMES McALISTER,
E. GIDDINGS, jr.,

GEORGE SHAZER,
HENRY D. COCK,
S.S. FORD, jr.,
JOHN W. McALISTER,
CLOVINGTON CUSHMAN,
PETER ANDERSON,
SAMUEL KLADY,
W.H. PULLEN,
P.O. HOUGH,
E.R. TYERALL,
GEORGE GIBBS,
BENJ. F. SHAW, *Interpreter,*
HAZARD STEVENS

And whereas the said treaty having been submitted to the Senate of the United States, for its constitutional action thereon, the Senate did, on the third day of March, one thousand eight hundred and fifty-five, advise and consent to the ratification of its articles by a resolution in the words and figures, following, to wit:

"IN EXECUTIVE SESSION,
SENATE OF THE UNITED STATES,"

March 3, 1855.

"Resolved, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded on the She-nah-nam, or Medicine creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendant of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squaksin, S'Homamish, Steth-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

"Attest: ASBURY DICKINS.
"Secretary."

Now, therefore, be it known that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the third day of March, one thousand eight hundred and fifty-five, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, having signed the same with my hand.

Done at the city of Washington, this tenth day of April, in the year of our Lord one thousand eight hundred and fifty-five, and of the independence of the United States the seventy-ninth.

FRANKLIN PIERCE

By the President:

W.L. MARCY, *Secretary of State.*

FEDERAL STATUTES INVOLVED

26 U.S.C. § 1. Tax Imposed.

(c) "There is hereby imposed on the taxable income of every *individual*...a tax..."

(d) "There is hereby imposed on the taxable income of every married *individual*...a tax..."

26 U.S.C. § 61. Gross Income.

"(a) General definition — Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items. (1) Compensation for services, including fees, commissions, fringe benefits, and similar items; (2) Gross income derived from business; (3) Gains derived from dealings in property; (4) Interest; (5) Rents; (6) Royalties; (7) Dividends; (8) Alimony and separate maintenan e payments; (9) Annuities; (10) Income from life insurance and endowment contracts; (11) Pensions; (12) Income from discharge of indebtedness; (13) Distributive share of partnership gross income; and (15) Income from an interest in an estate or trust.

26 U.S.C. § 7421. Prohibition of suits to restrain assessments or collection.

(a) Tax. - Except as provided in sections 6212(a) and (c), 6213(a), 6672(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

26 U.S.C. § 6211. Definition of a deficiency.

(a) In general. - For purposes of this title in the case of income, estate, and gift taxes imposed by subtitles A and B and excise taxes imposed by chapters 41, 42, 43, and 44 the term "deficiency" means the amount by which the tax imposed by Subtitle A or B, or Chapter 41, 42, 43, or 44 exceeds the excess of:

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over —

...

26 U.S.C. § 6212. Notice of deficiency.

(a) In general. - If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 41, 42, 43, or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

...

1 Stat 51. Art. III Northwest Ordinances of 1789.

"...[G]ood faith shall always be observed toward the Indians. Their lands and property shall never be taken from them without their consent."

9 Stat 323. Oregon (Territory) Donation Act of August 14, 1848.

"[N]othing contained in said act] shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such ri[illegible] shall remain unextinguished by Treaty between the United States and said Indians..."

APPENDIX B
OPINION/DECISION OF U.S. COURT OF APPEALS
(9th Cir.)

(Not For Publication)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SILAS V. CROSS, *Plaintiff-Appellant,* v. UNITED STATES, W.D. MALONE, District Director of U.S. Internal Revenue Service, Seattle District, *Defendants-Appellees.*	No. 90-35565 D.C. No. CV-90-5077-RJB MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Submitted March 20, 1991**

Before: HALL, THOMPSON, and RYMER, Circuit Judges.

Silas V. Cross, a member of the Puyallup Indian tribe, appeals the district court's dismissal of his action pursuant to the Anti-

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for disposition without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Inunction Act, 26 U.S.C. § 7421(a) and the Declaratory Judgment Act, 28 U.S.C. § 2201 for lack of subject matter jurisdiction. Cross sought declaratory and injunctive relief to prevent the Internal Revenue Service ("IRS") from issuing notices of deficiency and assessing tax liability against him on income derived from his smokeship, which is operated on tribal land, for tax years 1977, 1978 and 1979. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, *Kruso v. International Tel. & Tel. Corp*, 872 F.2d 1416, (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990), and affirm.

Cross contends that the district court erred in holding that it was without subject matter jurisdiction because (1) the doctrine of *Squire v. Capoeman*, 351 U.S. 1 (1956), precludes his liability for federal income taxes, (2) the Medicine Creek Treaty exempts him, as a member of the Puyallup Indian tribe, from federal income tax, (3) Article I of the United States Constitution exempts Indians from federal income tax, (4) he is "immune" from federal taxes, and therefore his action is not barred by the Anti-Injunction Act, and (5) the Puyallup Indian tribe, as a sovereign nation, is not subject to federal income tax. These contentions lack merit.

Cross already raised the first three contentions in *Dillon v. United States*, and we rejected them. 792 F.2d 849 (9th Cir. 1986) *cert. denied*, 480 U.S. 930 (1987). In *Dillon*, we held that (1) the doctrine of *Squire*, which provides that income derived directly from Indian tribal land is exempt from federal income tax, is not applicable to smokeshop income, even if the smokeshop is located on tribal land, (2) "[t]he Medicine Creek treaty does not confer a tax exemption for smokeshop income," and (3) Article I, which refers to "Indians not taxed," does not restrain the federal government from taxing Indians. 792 F.2d at 852 N.1, 854-55.

Cross's fourth contention, that the Anti-Injunction Act does not bar his action because he is "immune" from taxation, also

lacks merit. The Anti-Injunction Act ("Act") prohibits a taxpayer from bringing a "suit for the purpose of restraining the assessment or collection of any tax..." U.S.C. § 7421(a). The Act is strictly enforced. *See Maxfield v. United States Postal Serv.*, 752 F.2d 433, 434 (9th Cir. 1984); *see also Bob Jones Univ. v. Simon*, 416 U.S. 725, 736-37 (1974). Thus, ordinarily taxpayers are limited in district court "to suits for refund." *United States v. Condo*, 782 F.2d 1502, 1506 (9th Cir. 1986).

Absent one of the statutory exceptions, the only exception to the Act's bar is the two-prong test announced in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962). Under *Enochs*, injunctive relief is available if the taxpayer can demonstrate that (1) under no circumstances could the government prevail, and (2) the taxpayer will be irreparably harmed if the injunction is not granted. *Id.; see also Condo*, 782 F.2d at 1506. The taxpayer bears the burden of establishing both prongs of the *Enochs* exception. *See Elias v. Connett*, 908 F.2d, 521, 525 (9th Circ. 1990).

Here, Cross does not contend that his action falls within one of the statutory exceptions to the Act, and Cross has not satisfied the requirements of the *Enochs* exeption. Because we previously held in *Dillon* that Cross was not "immune" or "exempt" from federal income tax, the district court did not err in finding that Cross had failed to demonstrate that under no circumstances could the government prevail. Cross seeks to distinguish *Dillon*, arguing that there the issue was whether the income from his smokeship was "exempt" rather than "immune" from federal income tax. In *Dillon*, however, we used the terms "immune" and "exempt" interchangeably. *See e.g.*, 792 F.2d at 853. Moreover, Cross

cites no authority for the proposition that one who is "immune" from federal income tax is not barred by the Act.[1]

Finally, Cross contends that the Puyallup Indian tribe is a separate sovereign nation which is not subject to federal income tax. This argument was not raised in *Dillon*. However, we recently held that the United States holds legal title as trustee to all real property owned by the tribe. *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1254 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984). Given our holding in *Port of Tacoma*, Cross has failed to meet his burden of showing that under no circumstances could the government prevail.

Cross also failed to show that he meets the second prong of the *Enochs* exception, irreparable harm. Cross has an adequate legal remedy in that he can petition the tax court for a redetermination of deficiencies. Cross can also pay the tax and bring a suit for refund, and he has failed to show that paying the tax would cause him irreparable harm. Thus, Cross has failed to show that he meets either prong of the *Enochs* exception and is therefore barred by the Act from bringing this suit.

Cross also sought a declaratory judgment that he is immune from federal income tax. The Declaratory Judgment Act provides that declaratory relief is available from a court "except with respect to Federal taxes...." 28 U.S.C. § 2201. The purpose of the federal tax exception to the Declaratory Judgment Act is to protect the government's ability to assess and collect taxes and to limit taxpayers to suits for refund. *California v. Regan*, 641

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[1]Cross attempts to rely on *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1931). However, there, the party seeking the injunction showed both that the tax was illegal and that it would suffer irreparable injury. Further, the Court in *Enochs* distinguished *Miller v. Standard Nut Margarine* when it announced the two-prong test. *Enochs*, 370 U.S. 6-7; *see also Dillon*, 792 F.2d at 851-852 (taxpayers had either petitioned the tax court for a redetermination of their deficiencies or had paid the tax and filed a refund suit with the district court).

F.2d 721, 722 (9th Cir. 1981). "The federal tax exception to the Declaratory Judgment Act is at least as broad as the Anti-Injunction Act." Id. at 723 (quotation omitted).

Because Cross could not meet the *Enochs* exception to the Anti-Injunction Act, he also could not qualify for relief under the Declaratory Judgment Act. Accordingly, the district court correctly dismissed Cross's suit for lack of subject matter jurisdiction.

AFFIRMED[2]

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[2]Because we agree with the district court that it lacked jurisdiction to hear this suit, we do not reach the issue of whether W.D. Malone is a proper party to the lawsuit.

APPENDIX C
DECISION OF U.S. DISTRICT COURT FOR
WESTERN WASHINGTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SILAS V. CROSS, *Plaintiff,* v. UNITED STATES OF AMERICA, and W.D. MALONE, DISTRICT DIRECTOR OF U.S. INTERNAL REVENUE SERVICE, SEATTLE, DISTRICT, *Defendants.*	No. C90-5077B ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

THIS MATTER comes before the court on defendants' Motion to Dismiss. The court has reviewed all documents filed in support support of and in opposition to the motion, and the file. The court's ruling follows:

Plaintiff's lawsuit seeks a declaratory judgment and injunctive relief. Plaintiff, an enrolled member of the Puyallup Indian tribe, claims that he is not subject to federal income taxation pursuant to various Constitutional and treaty provisions. Plaintiff seeks to suspend the collection of assessed, or soon to be assessed, federal income taxes. Defendants argue that the court should dismiss plaintiff's Complaint for lack of subject matter jurisdiction, absence of controversy, lack of proper party, and governmental immunity.

ISSUES

1. Whether the court has jurisdiction to issue an injunction or declaratory judgment concerning federal tax issues.

2. Whether an actual controversy exists in this case.

3. Whether defendant, W.D. Malone, District Director of the Internal Revenue Service, Seattle District, is a proper party to this lawsuit.

4. Whether any statute cited by plaintiff waives the United States' immunity from suit.

DISCUSSION

1. Whether the court has jurisdiction to issue an injunctive or declaratory judgment concerning federal tax issues.

The defendants argue that plaintiff's Complaint should be dismissed for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(1) because the type of relief requested by plaintiff is barred by the Anti-Injunction Act and the Declaratory Judgment Act. Plaintiff argues that this court has jurisdiction because he is immune from taxation pursuant to various Constitutional and treaty provisions.

Plaintiff's Complaint requests the court to enter an injunction prohibiting the Internal Revenue Service ("IRS") from continuing to assess and collect his tax liabilities. The Anti-Injunction Act of the Internal Revenue Code ("IRC") provides as follows:

> [e]xcept as provided in Sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person whether or not such person is the person against whom such tax was assessed.

IRC § 7421(a).

Plaintiff has not alleged that any statutory exception to the Anti-Injunction Act applies. Absent some other exception, the Anti-

Injunction Act prohibits the court from granting the relief requested by plaintiff.

Plaintiff's Complaint also requests the court to enter a Declaratory Judgment declaring that the plaintiff, by virtue of being an Indian, is exempt from federal income tax on his trading operation from which his earnings are derived. The Declaratory Judgment Act applies to this request, which provides as follows:

> [i]n a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986,...any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28 U.S.C. § 2201(a).

Plaintiff has not alleged that any statutory exception to the Declaratory Judgment Act applies. Absent some other exception, the Declaratory Judgment Act also prohibits the court from granting the relief requested by plaintiff.

The rule is that a pre-enforcement injunction against the assessment or collection of taxes may be granted only if a taxpayer can show that (1) equity jurisdiction otherwise exists, and (2) under no circumstances can the Government ultimately prevail. *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 4 (1962). In an action to restrain taxation, a prayer for a declaratory judgment is similar to a prayer for an injunction. *See Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974). Unless both conditions are met, a suit for preventive injunctive or for declaratory relief must be dismissed.

First, plaintiff has not demonstrated that equity jurisdiction exists in this case. In federal court, equity jurisdiction in invoked when a party shows irreparable injury and that legal remedies are inadequate. *See Rondeau v. Mosinee Paper Corp.* 422 U.S. 49, 57 &1975); *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 313 (9th

Cir. 1982). Plaintiff has not exhausted his available legal remedies because he may petition the United States Tax Court upon issuance of a notice of deficiency, or fully pay the taxes which he believes have been illegally assessed and bring a civil action for a refund. *See Cool Fuel, Inc.*, supra.

Second, plaintiff has not demonstrated that there are no circumstances under which the government could prevail. Plaintiff's lawsuit pertains to the tax years 1977, 1978 and 1979. The Ninth Circuit Court of Appeals has already ruled in the United States' favor on the same issue for the 1976 tax year in *Dillon v. United States*, 792 F.2d 849 (9th Cir. 1986).

Accordingly, plaintiff has not met either prong of the required two-pronged exception to the Anti-Injunction Act and the Declaratory Judgment Act, and there are no relevant statutory exceptions thereto. Plaintiff's Complaint should be dismissed for lack of subject matter jurisdiction.

In light of the court's ruling on the first issue, it is unnecessary for the court to determine the remaining issues.

Therefore, it is

ORDERED that defendants' Motion to Dismiss Plaintiff's Complaing for lack of subject matter jurisdiction is GRANTED.

The Clerk of the Court is instructed to send uncertified copies of this order to all counsel of record.

DATED this 28th day of June, 1990.

/s/ Robert J. Bryan

ROBERT J. BRYAN
United States District Judge

APPENDIX D
COMPLAINT FOR DECLARATORY JUDGMENT
AND INJUNCTION RELIEF

UNTED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

Silas V. Cross, *Plaintiff,* v. United States of America, and W.D. Malone, District Director of U.S. Internal Revenue Service, Seattle District, *Defendants.*	No. C90-5077B COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

COMES NOW, Silas V. Cross, Plaintiff by his Attorney at Law. Douglas D. Sulkosky and for a claim for relief alleges:

I
JURISDICTION

A. SUBJECT MATTER

1.1 This case arises under provisions of the United States Constitution. Article I. Sec. 3, Clause 2 (Tribal Indians excluded from U.S. taxes), as amended by Amendment 14 Sec. 2 (tribal Indians excluded from representation), Amendment 16 (Income tax non apportionable); Article VI Sec. 2 (Supremacy of Treaties clause): Article II Sec. 2 (President alone negotiates modification of In-

dian treaties); Amendment V (vested treaty rights protected); construed together with the Medicine Creek Treaty of 1854 (10 Stat. 1132), and related circumstances of the Fox Island Conference agreed retrocession of 1856 and its confirmatory Order of 1857 by the United States President, Franklin Pierce of January 20, 1857 (land sovereignty restored), 9 Stat. 323, August 14, 1848 (Oregon Territory Donation Act); Article III Sec. 2 (cases in law and equity). The amound in controversy is over $10,000.00, therefore subject matter jurisdiction is vested in the U.S. District Court of Western Washington at Tacoma, Wash. by the authority of 28 U.S.C. § 1331.

B. PARTY JURISDICTION

1.2 U.S. District Courts pursuant to their equity powers have jurisdiction over equitable controversies involving the United States as a party, notwithstanding the provision of 28 U.S.C. § 1346 and 26 U.S.C. § 7421, Article III Sec. 2 United States Constitution (judicial power extends to cases in law and *equity*).

C. BASIS FOR EQUITY JURISDICTION

1.3 Article III Sec. 2 United States Constitution creates judicial power to extend to cases in law and *equity* arising under the Constitution laws and *treaties* of the United States. Judicial precedents provide for exceptions to the Anti-Injunction Act found in 26 U.S.C. § 7421. The Declaratory Judgment Act where otherwise applicable may be utilized in a federal equitable action 28 U.S.C. § 2201. No adequate remedy at law exists for Plaintiff and no asserted federal tax is constitutionally applicable. The U.S. Tax Court manifestly lacks jurisdiction to determine United States Constitution grounded and treaty provided for freedons and immunities from federal income taxation.

D. PARTIES

1.4 Plaintiff is an enrolled member (No. 50 on 1929 roll) of the Puyallup Indian tribe with whom he has lived in tribal relations all his life. Plaintiff is classified as ward of the United States Government as a noncompetent, restricted Indian who is in a state of pupilage, and is a tribal citizen of the Puyallup Indian Tribe. Plaintiff has during the calendar years of 1977, 1978 and 1979 engaged himself in exclusive treaty governed trade and commerce activities within the Puyallup Indian reservation. Plaintiff during the years of 1977, 1978 and 1979 was the owner and operator of a trading post or shop located upon land originally allotted to his Grandfather in 1881; succeeded to first by his Father, then his Mother and finally to himself as a direct heir pursuant to Article 6, Medicine Creek Treaty of 1854 as evidenced by the issuance of a "Certificate of [land] Assignment" of 1881 to his grandfather, followed by issuance of a "permanent home" trust patent to his grandfather in 1886 under the authority of the 6th Article, Medicine Creek Treaty of 1854. Plaintiff has engaged in no non-treaty governed economic activity since 1976.

1.5 Although the Puyallup tribe itself is not a party plaintiff herein, Plaintiff's rights powers and immunities are directly derived from the United States treaty with his tribe and therefore the tribal circumstance and status is necessarily alleged as follows:

> The Puyallup Tribe of Indians have existed prior to the foundation of this Nation, and prior to any and all adventuresome discoveries of and upon this Continent by any and all European discoverers, whether such foreign explorers conducted their adventures and claim in the name of a foreign government or in their own names solely. The Puyallup Indian Tribe, a native and aboriginal people, who have been situated here from time immemorial, are the owners, guardians and stewards of their skies, lands, waters and territory. The Puyallup Tribe is properly an independent and sovereign Nation which has never agreed or been coerced

(conquered) into subjection to the taxing authority of any other nation including the United States of America. It is not a nation which has been defeated by a foreign war, or which may have lost it's independence and sovereignty because of a foreign war. The existence of the Puyallup Indian Nation was formally and officially acknowledged therefore by the United States of America when the United States negotiated with the Puyallup Tribe the "She-nah-nam" or Medicine Creek Treaty of 1854. That Treaty was ratified by Congress in 1855 (10 Stat. 1132) The Fox Island Conference of 1856, which concluded the local treaty war of 1855-56, which in turn was confirmed by Executive Order of President Franklin Pierce on the 20th day of January, 1857, acknowledged that such conference occurred between sovereign and equal nations. The Puyallup Tribe as a principal warring tribe was one such nation so recognized in the Executive Order as being granted a substantial retrocession of its aboriginal land.

1.6 The Plaintiff has been, and is, subject to the authority of the Puyallup Tribal Council. The Puyallup Tribal Council is the governing body of the Puyallup Indian Nation. This is in accord with custom, history, and international law that said Tribe is a sovereign nation which by virtue of the Fox Island Conference of 1856 together with U.S. Executive Order of 1857 possesses sovereign, jurisdiction over said soil title to its territory which is itself a distinct basis for complete immunity from federal taxation. Plaintiff brings his claim for equitable relief herein based upon his treaty derived status as a Puyallup Indian living in tribal relations, not upon any basis correct or not of a United States citizenship status.

1.7 The Puyallup Tribe, at the commencement of the Treaty of Medicine Creek, 1854, was recognized by the government of the United States of America to be a sovereign and independent nation, with those prerogatives naturally accorded to a nation,

thus making all United States treaty guarantees and reserved rights and immunities the supreme law of the land including those reserved vested and retained rights to engage in free trade subject to geographical limitations only, and complete freedom or immunity from federal taxes of any kind whatsoever, forever.

1.8 That the threatened combined assessments against Plaintiff for the calendar years of 1977, 1978 and 1979 together with interest and penalties is in excess of $300,000.00 which is an astronomical sum to Plaintiff, far beyond his ability to have ever earned or to pay. The 1976 calendar year income tax assessment by the Internal Revenue Service never totaled more than $33,000.00 and it too was invalidly assessed under the legal principles raised by this complaint even though this matter is not complained of herein.

B. DEFENDANTS

1.9 The United States of America is a world wide powerful sovereign nation who has always maintained that its international relations are in conformity with international laws and with respect to Oregon Territory treaty Indians has passed enduring national laws which provide permanent protection for these Indian nations' treaty rights and immunities at the inception of the treaties. 1 Stat. 51 (1787); 9 Stat. 323 (1848).

1.10 The United States of America, in order to carry out its implied and express guarantees of protection to Medicine Creek treaty Indian people has taken the unassailed position by its acts and deeds, to prevent wholesale gruesome depredations, that these people were wards of the Federal Government to be regarded as in a formal state of pupilage with it as their guardian.

1.11 Defendant W.D. Malone, is the District Director of the Internal Revenue Service, an agency within the U.S. Department of the Treasury, for the Seattle District in Washington State, which territory adjoins and encloses the boundaries of sovereign territory of the Puyallup Indian Tribal Nation.

II
CAUSES OF ACTION

A. TREATY RETAINED ABSOLUTE IMMUNITY FROM FEDERAL TAXES'S VIOLATED BY I.R.S. ASSESSMENT

2.1 Defendants by their direct agents have threatened to issue to Plaintiff in the very near future an Internal Revenue Service assessment (notice of deficiency) of Federal Income taxes allegedly due and payable to the United States Governments for the financial years of 1977, 1978 and 1979. See copy of "Notice of Examination" attached along with pertinent correspondence. Exhibit A-1, A-2, A-3, A-4, A-5. This assessment is manifestly without any possible legal basis and jurisdiction as being in direct violation of the Federal taxes immunities inherent in the Medicine Creek Treaty of 1854 (10 Stat. 1132) and related Acts of Congress absolutely forbidding the imposition and the processes of Defendants complained of hereunder.

2.2 On the 26th day of October, 1989, Defendants' agents officially noticed Plaintiff with forthcoming assessments for Federal Income taxes allegedly due and payable for the calendar years of 1977, 1978 and 1979 on alleged income amounts which were clearly earned (if earned at all) through engaging in *treaty governed and Indian remedial legislation* activities in the nature of an exclusively tribally regulated treaty trading post operation including trade of cigarettes, of such a nature that no person could be engaged in the same as an ordinary affair of life. In the years of 1977, 1978 and 1979, Plaintiff did not earn any income while engaged in the ordinary affairs of life the same as any other U.S. Citizen.

2.3 That on the 24th day of December 1857 on the "She-nah-nam" Creek (Medicine Creek) near Olympia, Washington, it was the complete understanding of the Indian tribal representatives there assembled that the United States government desired only

a huge land cession from them of some 2,600,000 ares. That further it was their complete understanding that all of their sovereign, collective, and individual tribal rights would be totally unaffected by and beyond the reach of the United States Government forever. These collective and individual rights and freedoms included freedoms and immunities from both state, and federal taxes of any kind forever, along with comparable valuable rights and immunities respecting free trade, free fishing, free hunting, free manufactory, free gambling, etc. within the boundaries of their reserved territory as enlarged or as otherwise provided for by Article 12 of the Medicine Creek Treaty with respect to territory.

Furthermore United States Representatives present at the treaty site who both negotiated and drafted the said treaty fully understood the extent of aboriginal, sovereign, and individual rights and immunities including the guaranteed vested right of freedom and immunity from all federal taxation for all time as to all acts and circumstances within the scope of the Medicine Creek Treaty, unless consensually modified. No such modification has ever been undertaken or requested by the United States Government or the Puyallup Tribe.

2.4 Plaintiff in the years 1977, 1978 and 1979, has exclusively earned his living by engaging directly in Treaty governed trade by operating a trading post within the boundaries of the Puyallup Indian Reservation on treaty allotted, aboriginal, retroceded land in the same manner as did his father and grandfather before him. The latter named Jimmy Cross or "Pak-aw-wa-tish" was the original treaty "permanent home land" allottee and his allotment of 80 acres has been in the continuous use, possession, and enjoyment, save for 30 acres, of direct tribal family members to the present time. Since 1881 continuously in turn Plaintiff and his direct ancestors have conducted treaty protected free trade on said allotted land. Plaintiff began his treaty free trading on this land in the 1930's and it continued thereon through 1979.

in so far as pertinent herein. It was not until 1976 that Plaintiff or any of his ancestors were noticed to pay an income tax.

2.5 Plaintiff is duly and directly licensed by the Puyallup Indian Tribe to conduct his treaty guaranteed free trading rights, and besides paying an annual license fee is subject at all times to the Puyallup Tribal Code taxation jurisdiction and orders and resolutions of the Puyallup Tribal Council.

2.6 Plaintiff as a member of the Puyallup Indian Tribe living in tribal relations is subject to the jurisdiction and regulation of Title 25 U.S.C. and 25 C.F.R. and provided for controls and directions of the Bureau of Indian Affairs within the scope of said special legislation and related regulations.

2.7 During 1977, 1978, and 1979 Plaintiff was engaged in marketing (trading) in manufactured cigarettes with both co-tribal members and other non-tribal members who have chosed to reside or work or both within the boundaries of the Puyallup Indian Reservation. It is a historical fact since time immemorial to the present time, Puyallup Indian traders have freely traded in all manner of locally grown products and procured tobaccos products as well as imported tobacco products. Such was the precise situation that had evolved, and existed at the time of the Medicine Creek Treaty in 1854. It was one of the major understandings of the Medicine Creek signors that their free trade, as it was, and was later to be expanded with the non-Indians setters — as encouraged by the Chief United States treaty representative, would be free of regulations, and their earnings from trading would be free from all federal taxation *in futuro*.

2.8 Plaintiff conducted the aforesaid trading activity in 1977, 1978 and 1979 on original allotted treaty provided for "permanent home" land within the boundaries of the Puyallup Indian reservation and enlarged segment thereof per the Fox Island Conference of 1856. The peace pact result of which was confirmed by United States Executive Order of 1857. No part of the Puyallup reservation either the original or enlarged part thereof has

ever been put back into the public domain of the United States. Furthermore it is alleged that said "permanent home" allotted land has been in trust with the United States since 1881 and is confirmed in this trust status through implementation of the Indian Reorganization Act of 1934, 25 U.S.C. § 465 by Plaintiff in 1970, and is therefore in addition subject to its protections as well.

B. SOVEREIGN TERRITORIAL IMMUNITY FROM FEDERAL TAXES VIOLATED BY I.R.S. ASSESSMENT.

2.9 That in the circumstances of history together with International law and Federal-Indian law considerations the 1856-1857 enlarged territory of the Puyallup Indian tribe arising from a United States retrocession became once again aboriginal, sovereign, jurisdiction over the soil territory. Accordingly the tribal inhabitants (tribal citizens) are outside the taxing jurisdiction of the United States with respect to activities conducted within the territory of their sovereign homeland. No tax convention or agreement exists between the Puyallup Indian tribal Nation and the United States Government.

2.10 When the Medicine Creek Treaty was entered into in 1854, the tribes and bands claimed and were recognized by the United States to be the owners with jurisdiction over their soil. The United States recognized and treated with the Medicine Creek Treaty tribes and bands as one nation who legitimately claimed to own as aforesaid their certain territory composed of 2,600,000 acres including waterways.

2.11 Based upon promises and assurances of protections from high United States representatives, the Medicine Creek Treaty tribe and bands agreed to cede *all* of their sovereign owned territory (2,600,000 acres) to the United States by Article 1 of the Medicine Creek Treaty. However by Article 2, of the same treaty the United States reserved (withdrew, set apart) certain small portions of that territory sovereignly ceded to it for the exclusive use

and occupation of the tribe and bands. Thus all of the land involved became part of the sovereign public domain of the United States including the land reserved for said use and occupancy of the Indian tribes.

2.12 The Puyallup Indian tribe along with the Nisqually Indian tribe being aggrieved, "feeling tricked" by the insensibly small reserves of land set aside to them for their use and occupancy by Article 2, Medicine Creek Treaty, went to war with the United States military and settlers, who were either occupying under various claims or exercising some control over their actual formerly owned and used ancestral homeland territory. In this local war the United States military forces and settlers removed themselves for protection to Fox Island across the bay. Tribal warriors exercised full control over their ancestral territory at key positions therein. All of the laws of the United States over this territory which was then sovereignly in the public domain of the United States were suspended and could not be enforced as against the hostile presence of tribal nation war bands. As a result in August of 1856, a peace conference at Fox Island ensued wherein the Indian tribal demands for retrocession to them of their actual formerly owned and used ancestral homeland territory was granted in full by the Chief high representative of the United States Government and military present. This reconveyance of sovereign, jurisdiction over the soil, land out of the sovereign public domain to the Puyallup and Nisqually Indian tribes as demanded by each as a price for peace was specifically made from Article 1, Medicine Creek Treaty land then sovereignly owned by the United States pursuant to said Article 1.

2.13 By reason of the substance of the foregoing allegation contained herein, and especially in paragraph 2.9 through 2.12 inclusive, Plaintiff as a tribal inhabitant, conducting his trading in cigarettes, wholly within the boundaries of the Puyallup Tribal nation-within territory owned by it in sovereignty - is wholly im-

mune from any federal tax including the actual threat thereof by Defendants. Therefore no possible legal basis for the Defendants to make demand of Plaintiff for payment of any federal taxes exists.

C. NO JURISDICTION FOR INCOME TAX ASSESSMENT OF WARD OF U.S. GOVERNMENT EXISTS.

2.14 That Plaintiff is and has been recognized by law (court cases, U.S. statutes) to be a restricted non-competent Indian and in so far as the conduct of treaty and tribal governed affairs are concerned is a ward of the government. However, in so far as Plaintiff's conduct of "ordinary affairs" i.e. those not governed by the Medicine Creek Treaty, tribal law and remedial U.S. legislation, he is regarded as a U.S. citizen and not in a wardship status. As alleged herein, Plaintiff's operation of a trading post (which is not an ordinary affair) engaging in trade in cigarettes with tribal members and non-tribal members is undertaken exclusively by Plaintiff in his status as a ward of the United States Government.

2.15 Plaintiff as a ward of the United States Government in the precise treaty governed activity he is involved in is necessarily free from all federal taxation including federal income taxation including federal income taxation. Therefore no possible legal basis upon this ground alone exists for the threatened assessment of federal income taxes against Plaintiff by Defendants through their agents. No adequate remedy at law exists because of the Anti-injunction Act contained in 26 U.S.C. § 7421. therefore Plaintiff has no other choice but to petition the conscience (equity) of the U.S. District Court for relief.

WHEREFORE, this court is petitioned to declare:

1. That elementary Federal/Indian law principles of great weight and precedent require: A. That Indian treaties arising in what was in 1854 the United States designated Oregon Territory are to be interpreted to conform to the understanding of the Indi-

an treaty signers, and that further; B. Aboriginal rights and interests not granted to the United States Government by the treaties are retained by the Indians; C. That the Plaintiff as a Medicine Creek Treaty of 1854 governed Indian possesses a non-granted aboriginal right to be free and immune from all Federal taxation in connection with his conduct of aboriginal trade within the boundaries of the United States. And that further Plaintiff's conduct of such trade in the circumstances of this case is clearly not in furtherance of the ordinary affairs of U.S. citizenship.

2. That the Oregon Territory Donation Act of 1848 (9 Stat. 323) mandated the position of the United States with respect to its Indian treaty making demands, impositions, and guarantees in 1854. This act expressly provides that no property of the Indians (treaty or other federally recognized Indians) will ever be taken from them without their consent, and is clearly applicable to all federal taxes of any kind.

3. Plaintiff as a Puyallup tribal nation inhabitant and citizen is immune from federal income taxes on income earned within his nation's sovereignly owned territory. Freedom from United States income taxation being an elemental attribute of territory owned and held in sovereignty by another United States recognized nation.

4. It is unlawful for the United States taxing authorities to attempt by I.R.S. assessments process to imose income taxes on its legal Indian wards for the benefit of the United States — their guardian.

5. That in any event the guardianship — ward status and relationship between the United States Government through its Bureau of Indian Affairs and Plaintiff would require the Internal Revenue Service by its agents to direct its assessment process on the known guardian of Plaintiff when he is acting in treaty and special statutory related activities.

6. The U.S. Tax Court is an administrative board of special jurisdiction only having statutory authority to re-determine as-

sessments of federal taxes under the United States Tax Code, thus having no jurisdiction to determine United States Constitutional/treaty based claims of freedom and immunities from federal taxation.

7. That no possible legal basis for imposing a federal income tax on Plaintiff's treaty trading operation derived earnings exist. And further no adequate remedy at law exists to address and resolve the claim for relief of Plaintiff.

Dated this 9th day of February, 1990.

By: /s/ Douglas D. Sulkosky

Douglas D. Sulkosky
Attorney for Plaintiff
Silas V. Cross

5631 Sprague Avenue
Tacoma, Washington 98409
(206) 473-5580

APPENDIX E
EXTRACTS OF LEGISLATIVE HISTORY OF "CONTRABAND CIGARETTES TRAFFICKING ACT"

LEGISLATIVE HISTORY
P.L. 95-575
(Page 5520)

Take the State's high cigarette tax, add the number of interstate highways entering Florida and the State's close proximity to those tobacco-producing States which levy almost no cigarette tax and you've got the perfect market for cigarette smugglers.

A number of recent studies have detailed the nature and extent of cigarette bootlegging throughout the country.[6] The most recent of these studies, conducted by the Advisory Commission on Intergovernmental Relations (ACIR), found that cigarette bootlegging was a serious problem in 14 States and a moderate problem in 8 other States. The 14 States which considered cigarette bootlegging to be a serious problem contained nearly one-half of the nation's population. ACIR estimated that $391 million in revenue to the States was lost each year as a result of cigarette bootlegging, and for 13 States this amounted to as much as ten percent of their total cigarette tax revenue. As estimated in millions of dollars, the loss to the individual States as computed by ACIR is as follows:[7]

Alabama	6.9	Missouri	5.0
Arizona	3.4	Montana	.3
Arkansas	6.5	Nebraska	1.7
California	16.0	New Jersey	26.0

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[6]*E.g. Cigarette Bootlegging: A State AND Federal Responsibility*, Advisory Commission on Intergovernmental Relations (May 1977), reprinted in Hearings pp 16 125; *Combatting Cigarette Smuggling*, Law Enforcement Assistance Administration, Department of Justice (January 31, 1977).

[7]Hearings, pp. 86-87

Connecticut	15.1	New Mexico	1.0
Delaware	.2	New York	72.3
Florida	35.7	North Dakota	.2
Georgia	2.8	Ohio	16.9
Illinois	21.7	Oklahoma	1.2
Iowa	4.0	Pennsylvania	35.6
Kansas	1.6	Rhode Island	.3
Louisiana	2.1	South Dakota	.1
Maine	2.1	Tennessee	7.8
Massachusetts	12.1	Texas	43.1
Michigan	6.9	Washington	13.2
Minnesota	12.2	West Virginia	1.9
Mississippi	1.3	Wisconsin	13.6

These figures show that nearly 70 percent of the States are affected in varying degrees by cigarette bootlegging.

Four distinct types of cigarette bootlegging have been identified by those who have surveyed and analyzed the problem:

Organized cigarette smuggling encompasses the activity of those persons who transport quantities of cigarettes from low-tax States to high-tax States for profit, and incudes both the small part time operations as well as the large-scale activity engaged in by organized groups.

Mail-order purchase of cigarettes involves the shipment of cigarettes from low-tax to high-tax States through use of mails.

Purchase of cigarettes through *tax-free outlets* includes cigarettes obtained from three primary sources: *international points of entry, military post exchanges*, and *Indian reservations. In some instances the cigarettes are resold for profit within a high-tax State. (emphasis added.)*

CIGARETTES — RACKETEERING
P.L. 95-575
(Pages 5537-58)

2. *DEFINITIONS*

A. Definition of the term "contraband cigarettes"

1. The Senate bill defines "contraband cigarettes" as a quantity of sixty thousand or more cigarettes, bearing no evidence of the payment of applicable State cigarette taxes in the State in which they are found.

The House amendment is similar but defines "contraband cigarettes" as a quantity in excess of 30,000 cigarettes.

The conference substitute adopts the House provision with a modification *providing that "contraband cigarettes" means a quantity in excess of 60,000 cigarettes.*[1]

2. The Senate bill excludes from the definition of "contraband cigarettes" those cigarettes in the possession of four specific classes of persons.

The House amendment similarly excludes from the definition of "contraband cigarettes" cigarettes in the possession of the same four classes of persons, except that (1) the exclusion for cigarettes in the possession of common or contract carriers only applies to those transporting cigarettes under a proper bil or lading or

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[1]Some concern was expressed in the course of the conference that the definition of "contraband cigarettes" inadvertently extinguished rights of certain Indians and Indian tribes under current law to engage in the commercial sale of cigarettes within Indian country free of State taxation. The phrase "applicable State cigarette taxes" makes it clear that this legislation is not intended to affect transportation or sale by Indians or Indian tribes acting in accordance with legally established rights.

The conferees do not intend that this bill address the current exemption from state taxation of cigarette sales on Indian reservations and nothing in this bill is intended to affect this or any other immunity from state tax held by any Indian or Indian tribe. Similarly, other commercial cigarette sales exempted by law from State taxation (for example, military post exchanges) are not affected by this legislation.

freight bill which states the quantity, source and destination of such cigarettes, and (2) the exclusion for cigarettes in the possession of persons licensed or otherwise authorized by the State where the cigarettes are found to account for and pay cigarettes taxes imposed by such State only applied to those who have actually complied with the accounting and tax payment requirements relating to such license or authorization with respect to the cigarettes involved.

LEGISLATIVE HISTORY
P.L. 95-575

The conference susbstitute adopts the House provision with modifications.

(3) UNLAWFUL ACTS

Section 1286 of the Senate bill makes it unlawful for any paerson knowlingly to possess, sell, distribute, carry, transport, purchase or receive contraband cigarettes. Section 1288(b) included an offense for knowingly making a false statement or representation with respect to information required by the Secretary to be kept in the records of a person.

The House amendment declares: (a) It shall be unlawful to knowingly ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes. (b) It shall be unlawful to knowingly make any false statement or representation with respect to the information requred to be kept in the records of a dealer.

The conference substitute adopts the House provision with modifications adding the phrase "whoever" to both subsections (a) and (b).

B. Definitions of "dealer" and "person"

The Senate bill does not use or define the term "dealer". Coverage of the bill is directed at any "person", defined to include "any individual, corporation, company, association, firm, partnership, society, or joint stock company."

The House bill defines the term "dealer" to mean "any person who sells or distributes in any manner any quantity of cigarettes in excess of 30,000 in a single transaction." "Person" is not defined.

The conference substitute deletes the definition of "person" because "person" is defined in 1 U.S.C. 1 for all Act of Congress. The term "dealer" is also not included in the conference substitute.

The term "dealer" was primarily used in the House bill to designate and limit those persons subject to the recordkeeping provisions. This can be effectively accomplished by selective use of the operative language in the definition of the prohibited conduct.

C. Definition of "common or contract carrier"

The House bill provides a more detailed definition of "common or contract carrier" than the Senate version by explicitly including a carrier holding "a permit for contract carrier by motor vehicle, or other valid operating authority under the Interstate Commerce Act".

The conference substitute adopts the House provison.

D. Definition of "State"

The Senate bill defines "State" to include "Puerto Rico, or a territory or possession of the United States".

The House provision substitutes "the Commonwealth of Puerto Rico, or the Virgin Islands" for this language.

APPENDIX F

A-F-F-I-D-A-V-I-T
of
Barbara Lane, Ph.D.

STATE OF WASHINGTON
PIERCE COUNTY | ss.

I BARBARA LANE, being first duly sworn on oath, depose and say:

My name is Barbara Lane and I reside at 4151 San Mateo Place, Victoria, British Columbia, Canada. I am a consulting anthropologist. I received Bachelors and Masters degrees from the University of Michigan and a Doctorate from the University of Washington, all in anthropology. I also did post-doctoral work in anthropology at the Australian National University.

I have done extensive research on the culture and history of Native people in the northwestern part of North America. I was employed by the United States Department of Justice for several years as a consultant to gather anthropological information concerning the treaties negotiated in 1854 and 1855 between the United States and the Indian tribes of Western Washington. I have testified as an expert witness in several court cases concerning the history and culture of Indian tribes in this area. For example, Judge Boldt relied on my testimony and presentations in *United States v. Washington*, commenting in particular at page 350 of volume 384 of Federal Supplement.

In the course of my research I have studied original source materials (writings of people who had direct contact and dealings with the Indians at the times in question) as well as secondary sources (writings of other anthropologists and historians). At the request of the Puyallup Tribe I investigated the available materials to report to them on the history of the Indian's involve-

ment in trade and commerce, and the purpose of Article 12 of the Treaty of Medicine Creek and the parties' understanding of that provision. This affidavit is a summary of my findings.

Trade has always been an integral part of the Indian economy in the Northwest. In aboriginal times, the Puyallup Tribe traded extensively both with Indians in their immediate vicinity and with tribes east of the mountains. After the arrival of the non-Indians, the Puyallups' trade expanded to include the non-Indians. By treaty times, as well as after the treaty was signed, Indian trade was vital to the economies of both the settlers and the Indians. The Puyallups, as well as other Indians, traded not only products they produced and processed in their own territories, but also goods which they imported from outside their territory and traded, as middlemen, to others.

Puyallup Indians had been engaged in systematic and continuous trade with non-Indians for over 20 years prior to the Treaty of Medicine Creek. Puyallups had been trading with the Hudson Bay Company since the establishment of Fort Nisqually in 1833.

Puyallups traded a wide variety of products to both Indians and non-Indnans. Those included fish, shellfish, berries, furs, duck feathers. Puyallups imported grasses which were used in making salmon seines and dip nets, duck nets, carrying straps and other items of Puyallup manufacture for which fiber string was used. One of the most important items supplied by Indians to non-Indians was oil to be used for lubrication and for lights. All moving parts in machinery (ships, grist mills, sawmills), as well as skid roads were lubricated with oil purchased from the Indians. The lamps used for domestic lighting as well as the lighthouse relied on oil processed by the Indians.

Tobacco was one of the items of Indian trade, both among themselves and with the non-Indians. Tobacco is one of a number of commercially important plants first domesticated by American

Indians and now used throughout the world. No other domesticated plant had so wide a geographic distribution in North America before the Europeans arrived.

Tobacco was used in a variety of ways by the Indians. It was chewed, taken as snuff, smoked in pipes, smoked as cigars wrapped in its own leaf, smoked as cigarettes wrapped in leaves of other plants, burned as incense, and scattered as offerings. Tobacco was used as medicine, as a sacrifice, for ritual purposes, or for pleasure. Almost everywhere in native North America tobacco was highly valued and was believed to have special property and powers. Attitudes toward it ranged from respect to awe.

Although records on this subject are a bit sparse, at least some of the Indian tribes in northwestern North America grew various forms of tobacco. There are several accounts from non-Indian explorers and settlers describing cultivation and use of tobacco by various Indian tribes in this area. Although there is no record of whether or not tobacco was grown by Indians in the area of the Puyallups, it is important to note that the word used for tobacco in the local languages appears to be a native word without any obvious non-Salish connection. If tobacco had been a recent introduction into the area, we might expect to find a composite or a borrowed name for it.

There is documentation of the use of tobacco by Puyallups. The extensive trade conducted by the Puyallups undoubtedly included trade of tobacco. The Twana (Skokomish) did not grow tobacco but obtained it in trade from groups at the southern end of Puget Sound. A missionary to the Skokomish specifically identified the Puyallups as one of the tribes engaged in trade with the Skokomish. Further, the Puyallup valley was a trade center where Indians from various tribes gathered and traded a variety of items.

The wide distribution of tobacco and pipes is clear evidence of the importance of aboriginal trade of those products. One of the species of tobacco grown and used in the northwest had its

origin in California, and was found along the Oregon coast and the Willamette Valley, both of which were trade routes to the Northwest. It also was found along the middle Columbia and was grown in abundance along the Snake River, a major trade route from the plains across the plateau of the Northwest coast. From there, its distribution extended across the Rockies to Montana and Saskatchewan where it was grown by the Blackfoot, Crow and Sarcee.

The archeologicial record also shows evidence of trade items from the Northwest Coast in the upper Mississippi region and, conversely, items from the Great Lakes and Upper Missouri occur in the Northwest. Tobacco diffused eastward along this route to the headwaters of the Missouri where it met the tobacco of Eastern North America *Nicotina rustica*. There was also a wide distribution of several kinds of pipes used for smoking tobacco, further demonstrating the wide range of trade for those items. When the Europeans arrived in the the Northwest they introduced some new forms of tobacco as part of the trade with the Indians. Tobacco was used as a trade item, but also was important as a good will gesture and was sometimes used as a medium of payment.

As the trade between the whites and Indians increased, the demand for tobacco became insatiable. Tobacco became the key item in Indian-white commerce in the northwest as well as in every other part of North America. Hudson's Bay Company records clearly demonstrate that critical importance.

In the years after the treaty was signed, Puyallups increased their trade with non-Indians. Those commercial activities contributed significantly to the Puyallups' economy as well as to the prosperity and economy of the territory. For several decades the Indians on the Puyallup Reservation raised surplus agricultural produce which they sold to non-Indians. This commerce was carried on with the support and encouragement of the United States. The Indians also cut timber from their land to sell to non-Indians.

Governor Isaac Stevens, who was in charge of negotiating treaties with the Indians in the Northwest explicitly recognized the importance of the Indian trade to the Indians and to the settlers. In the letter transmitting the Treaty of Medicine Creek, which had just been concluded, Stevens explained the Treaty provision in his letter to the Commission:

> The Indians on Puget Sound have been for a considerable time in contact with the whites, have acquired many of their habits and all their vices. *They form a very considerable proportion of the Trade of the Sound*...They catch most of the fish, supplying not only our people with clams and oysters, but salmon to those who cure & export it. (emphasis added).

In the treaty negotiations Stevens specifically assured the Indians that they would be able to trade with the settlers. Referring to the increased opportunities offered in the treaty, Stevens said:

> Now there used to be twice as many Indians...and they could not sell salmon, oysters and cranberries to the settlers for there were none. Well, you can now not only sell these things but you will besides be furnished yearly with clothing, tools....

There was only one limitation on that trade discussed. George Gibbs, a lawyer-ethnologist, who assisted Stevens and drafted the treaties in western Washington, reported earliert in 1854 on the considerable Indian trade with Vancouver Island and recommended that when treaties were made the Indians should agree to restrict their trading to American territory.

> The Clallams, as well as the Makahs and some other tribes, carry on a considerable trade with Vancouver's Island, selling their skins, oil, etc., and bringing blankets in return. At present it is hardly worthwhile to check this traffic, even if it were possible; but when the white population increases it may become necessary as a revenue measure. In any

> treaties made with them, it should enter as a stipulation that they should confine their trade to the American side.

That suggestion was incorporated as Article 12 of the Treaty of Medicine Creek negotiated later in 1854.

> The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States....

The treaty provision was designed to insure that the Indian trade would contribute to the prosperity of the territory, rather than to the British possessions. It was not intended to limit the volume of Indian trade, but rather to confine it to the American side of the border. Apart from this, no other restrictions were placed on Indian trading activities. No provision was inserted to the effect that Indians would be required to have licenses or permits to trade or that their trading would be taxed. The most reasonable conclusion is that the Indians would have understood their trading activities to be secured by the treaty and that no other limitations, other than the geographical restriction in Article 12, were intended.

The Treaty of Medicine Creek included two other provisons which have a bearing on the Tribe's trade and commerce. Article 2 of the treaty set aside a reservation for the Puyallup's exclusive use. (The area included within the reservation was expanded by the Executive Order of January 20, 1857). One of the purposes for creating the reservation was to set aside an area where Puyallup Indians could continue to support themselves.

In Article 10 of the treaty, the United States agreed to provide the Indians with certain tools and training. The purpose of that provision was to create some additional means for the Indians to support themselves, since the vast cession of land would presumably reduce, to some extent, the Indians' access to natur-

al resources. One result of the "tools and training" provision was the increased trade with non-Indians described earlier in this affidavit.

/s/ Barbara Lane
BARBRA LANE

SUBSCRIBED and SWORN to before me this 7th day of _____, 1980.

/s/
Notary Public, in and for the State of Washington, residing at _____.

APPENDIX G
EXCERPT FROM APPELLANT'S BRIEF TO THE COURT OF APPEALS

ARGUMENT D. THE PUYALLUP INDIAN NATION OWNS SOVEREIGN, JURISDICTION OVER THE SOIL TITLE TO ALL OF ITS ENLARGED TERRITORY PER FOX ISLAND COUNCIL RETROCESSION OF 1856 THUS EXCLUDING THE FEDERAL TAXATION ARM.

INTRODUCTION TO 1856 RETROCESSION TO PUYALUPS

The territory retroceded to the Puyallup Indian nation by the Fox Island Council of 1856 compromises the Puyallup Indian Nation's sovereign, right to the soil territory over which the United States of America has absolutely no control or taxing jurisdiction except as provided for in the Medicine Creek Treaty of 1854 (10 Stat. 1132). The taxing arm of the United States is excluded from the province of Puyallup Indian Nation territory, the latter having a full national paramount character of its own, by reason of its jurisdiction over the soil (right to the soil) title, and its obvious treaty time retained right of freedom or immunity from U.S. taxes of any *species, then or thereafter existent.* (Medicine Creek Treaty of 1854; Fox Island Council retrocession of 1856). Therefore Appellant, a tribal citizen residing within the territory of his own wholly *sovereign*, national homeland is *wholly immune* from United States taxation on the activities he conducts within it. This is certainly no different that the situation of the Canadian citizen selling goods in Canada, or the French citizen in Franch doing the same.

In the case of *Puyallup Indian Tribe v. Port of Tacoma*, 717 F. 2d 1251 (9th Cir. 1983), the Court declared the basic truth regard-

ing the involvement of Puyallup Indian tribal citizens in *the war* with the United States military and American settlers in 1855, and 1856 as follows:

> *"...PUYALLUP INDIANS CONCEIVED OF THEIR TERRITORY AS THE PUYALLUP RIVER AND THE SURROUNDING LAND..."* (emphasis added)

At the Fox Island Council of 1856 which marked the end of the Indian War of 1855-56, it was determined by that Council local (including Puyallup tribal chief warriors) that the Puyallup territory was to be expanded by the U.S. government retroceding to the Puyallups certain land then encompassed within Article I of the Treaty of Medicine Creek. The Court said at page 1260:

> "The parties at the Fox Island Council thus agreed to expand the Puyallup Reserve to include the lower portions of the Puyallup river. The Commissioner of Indian Affairs and the Secretary of the Interior recommended that the agreement be adopted. President Pierce approved those recommendations in an Executive Order of January 20, 1857. Those recommendations show that the Reserve *was expanded pursuant to Article 1 of the Treaty of Medicine Creek. (10 Stat. 1132.) The expanded Reserve included the property involved in this case."* (emphasis added.)

Thus the territory originally ceded by the Puyallups was retroceded to them out of the public domain of the United States in 1857. The same having originally gone into the public domain of the U.S. by said Article 1, Medicine Creek Treaty in 1854.

Through the Fox Island Council of 1856 the land which was retroceded back to the Puyallup Indian nation was land over which they could re-assert paramount, sovereign, jurisdiction over the soil title, to the same extent as the United State had per original cession to it in 1854 by Article 1, Medicine Creek treaty. The

retroceded[4] land did not have the status as land which would be held for mere *exclusive use and occupancy.* To the contrary, that land, which the Puyallup Indian Nation gained by the peace pact was some of their aboriginally owned home land and territory over which the Puyallups had exercised sovereign dominion, but for the brief period of 1854-56, when the United States held the sovereign dominion (jurisdiction over the soil title) by a treaty time overreaching device which directly caused the local Indian war of 1855-56 to ensue.

The purpose of the Fox Island Council was for a peace pact or treaty of war. The Puyallup and Nisqually tribes could reclaim their sovereign, jurisdiction over the soil title to the land base containing their established primary village sites, and main waterways; the U.S. government would obtain a solemn peace pact in return. The abiding intentions of the Indian tribes were to never cede their sovereignly owned and occupied aboriginal *homelands* or village sites and waterways in the first place. The extent of territory demanded for a peace settlement as met by U.S. government representative Governor Isaac Stevens was actually dictated by Puyallup and Nisqually chiefs and headmen at the Fox Island Council. The status of this territory in which Appellant resides on treaty allotted land has not changed from 1856 to the present time.

HISTORICAL BACKGROUND TO 1856 RETROCESSION TO PUYALLUPS

Long prior to 1854, sovereign, jurisdiction over the soil (right to the soil) title to the land was recognized by the United States and Great Britain to be in the various Indian tribes living within

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[4]"The term retrocede would seem to limit it to what had been before ceded; such is the natural and most obvious signification of the term. In this sense it is used by this court in *Johnson v. McIntosh*, (8 Wheaton 584), where it is said, 'France ceded Louisiana to Spain, and Spain has since retroceded the same country to France.' " *Foster and Elam v. Neilson*, 27 U.S. 253, 267 (1829).

the so called Oregon Territory. The United States and Great Britain, as between themselves, viewed their presence in this territory as in the nature of joint possession only, but with the United States asserting a superior interest or position as between the two Nations. See 1881 North Pac. Coast Journal (Vol. 2, No. 3 and No. 5) articles of considerable historical significance explaining the position of the United States of America and Great Britain *vis* a *vis* the Northwest Coast territory to be known as "the Oregon territory." (CR 9 Ex. "C"). Pertinent excerpts here are: (CR 9 Ex. "C" p. 33 of No. 3)

> "It may be fairly stated that Great Britain asserted no *exclusive* title, preferred to acquire and rely upon possession, strengthening her claim by settlements permitted by other Nations, who in such permission admitted that their title was *insufficient* to authorize her exclusion. Being thus in possession and herself the judge of the indefeasibility of adverse title, she could elect whether she would be ousted. The situation is thus defined by negotiations, while we have not title, we want possession. In the meantime, we do not admit your title to be any better than ours."

The right of discovery as exercised by the United States and other "civilized nations" could not be construed as a claim necessarily superior to that of the Indian tribes and their inhabitants to the lands of territoyr involved. The full explanation of this right of discovery is found in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (1823), in which Chief Justice Marshall wrote at 573:

> "This principle was, that discovery gave title to the government by whose subjects, or by those authority, it was made, against all other *European Governments*, which title might be consumated by possession. The exclusion of all other Europeans, necessarily gave to the Nation making the discovery *the sole right* of acquiring the *soil for nations* and establishing settlement upon it. It was a right with which

> no European could interfere. It was a right with which all asserted for themselves, and to the assertion of which, by other, all assented. *Those relations which were to exist between the discoverer and the natives were to be regulated by themselves....*" (emphasis added.)

The United States of America, a sovereign nation, espoused a policy and belief that Indian tribes were to be treated as Nations, who owned paramount, sovereign, jurisdiction over the soil (right to soil) title to their aboriginal tribal lands, (except for tribes *east* of the Mississippi River, whose sovereign title to their occupied land had been extinguished by the British "sword"), whose status and interest was to be determined by land cession Treaties. Indian sovereign title to land acquired by conquest by the United States' predecessor(s) in interest would be regarded by the United States as having been already extinguished when United States succession to these lands took place. In *Johnson v. McIntosh*, supra, the Court at length explained this: (At page 588 & 589).

> "...*Conquest gives a title which the Courts of the Conqueror cannot deny*, whatever, the private and speculative opinion of individuals may be, respecting the original justice of the claim which has been successfully asserted. The *British government, which was then our government and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians within the chartered limits of British Colonies*. It asserted also a limited sovereignty over them and the exclusive right of extinguishing the titles which occupancy gave to them. *These claims have been maintained and established as far West as the River Mississippi by the sword*. The title to a vast portion of the lands we now hold, originates in them. It is not for the courts of this country to question the validity of this title, or to sustain one which is incompatible with it.

The United States claim to the Northwest Coast Territory was not a claim of owning title to some or all of the Indian territory,

but was a claim of exclusive discovery only. If the United States believed itself to be invested with sovereign title to the land, it would not have sought to enter into solemn land cession treaties with the Indian Nations which were predicated upon United States recognition that the Indian nations therein were the *owners and possessors of their soil in sovereignty.*

In 1866 the congress of the United States by record of debate on adoption of the 14th Amendment very authoritatively in the United States Senate, by the illustrious Senator Howard, explained the International law view of the U.S. government with respect to the ownership status of aboriginal Indian lands within the scope of United States "discovered" territory. At page 2895 of the Congressional Globe 1st session, 1866, he said:

> "It has been the habit of the government from the beginning to treat with the Indian tribes as sovereign Powers. The Indians are our wards, such is the language of our courts. They have a national independence. *They have an absolute right to the occupance of the soil upon which they reside; and the only ground of claim which the United States has ever put forth to the proprietorship of the soil of an Indian territory is simply the right of preemption; that is, the right of the United States to be the first purchaser from the Indian tribes. We have always recognized in an Indian the same sovereignty over the soil which it occupied as we recognize in an foreign nation of a power in itself over its national domains. They sell the lands to us by treaty, and they sell the lands as the sovereign Power owning, holding, and occupying the lands.* (emphasis added.)

Conquest as a means of obtaining sovereign dominion (jurisdiction over the soil) over Indian sovereign tribal land as needed by its settlers in Oregon territory was eschewed. (See Oregon Donation Act of Aug. 14, 1848 9 Stat. 323 *infra*, Argument E). Instead the U.S. government would rely on negotiations for desired land cessions to it of Indian tribal land held in sovereignty. Also

Chief Justice Marshall in Johnson v. McIntosh, supra, had explained the U.S. view as to the status of sovereign, right to the soil title to land held by aboriginal natives and their tribes not yet affected by British claims and pretensions of conquest by the sword in this very way: (At page 593)

> "Another view has been taken of this question, which deserves to be considered. The title of the Crown, whatever it might be, could be acquired only by a conveyance from the Crown. If an individual might extinguish the Indian title, for his own benefit, or in other words, might purchase it, still he could acquire only that title. Admitting their power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from their will...*The person who purchases lands from the Indians within their territory, incorporated himself with them, so far as respects the property purchased; holds their title under their protection and subject to their laws*...We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract in severalty. As such a grant could not separate the Indian from his nation, nor give a title which our courts could distinguish from the title of his tribe, as it is might still be conquered from or ceded by his tribe. We can perceive no legal principle which will authorize a court to say that different consequences are attached by this purchase, because it was made by a stranger [to the tribe]." (emphasis added.)

Thus it is clear that sovereign, *right to the soil title* to land ("title of the Crown") held by a nation including any U.S. recognized Indian tribal nation is a fact recognized by the U.S. government as controlling. The fact that several types of claims of fee or other

title to parcels to land within the Puyallup Tribal Nation's territory exist, does not affect the underlying reality, that, Puyallup Indian Nation soil or territory is, and remains sovereign, with jurisdiction over the soil in it, not in the United States.[5] Ownership of land parcels by non-tribal citizens, within Puyallup sovereign territory to the extent legally possible, *obviously* does *not* change the sovereign, jurisdiction over the soil character of the tribal nation's territory. The foregoing *while being absolutely definitive* is of course only true where the tribal nation owns its territorial land base *in sovereignty* as does the Puyallup Indian nation. If tribal nation land is owned in *use and occupancy only* as most tribal nation land or territory is within the United States, then the above principles of international law are of little use because the United States by treaty or conquest has gained the sovereignty, or right to the soil itself.[6] Thus this type of use and occupancy Indian land is wholly within the public domain of the United States whereas Puyallup Tribal nation sovereign land or territory is not within the U.S. public domain.

Court precedents having an international law character binding upon the United States government support Appellant's claims of immunity from Federal taxation laws as based upon his citizenship in a sovereign nation which holds sovereign jurisdiction over the soil of its territory as well. This situation is comparable to

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[5] It may be argued that this right to the soil or paramount title is however held in trust by the U.S. for the benefit of the tribal nation.

[6] According to Felix Cohen "Handbook of Federal Law," p. 89: *"The principal sources of congressional authority over Indian affairs are summarized by a leading authority in these terms:"*

> '...[T]he regulations of Indians has gone much further [than the constitutional bases therefor.] Much power has been exercised because the whole Indian country except the few Eastern reservations was formerly part of the natural domain with exclusive title and sovereignty (except...restricted by Indian occupancy) in the natinal government.'

See Rice, *The Position of the American Indian in the Law of the United States* (1934) 16 J. Comp. Leg. 78.

the principality of Monaco which is free of the sovereignty of France (save for treaty commitments if any) because of owning its territory in sovereignty as well as having a sovereign nationhood.

In the case of *United States v. Rice*, 17 U.S. (4 Wheaton) 246 4 L.Ed. 562 (1819) the Supreme Court was compelled to give an international law effect to the reality of a hostile military occupation of a certain portion of its sovereignly owned, held and controlled territory known as the "Castine" territory located within the United States' designated District of Maine. The Court held that the occupation was so pervasive that United States revenue laws and other laws were completely suspended during the hostile takeover by the *military and naval forces of Great Britain*. Justice Story ruled that in 1814:

> "Castine was captured by the enemy and remained in his exclusive possession under the...control of his military...forces until...the treaty of peace in 1815."

A parallel situation occurred in the lower Puget Sound region in 1855-56, the enemy of the United States obviously being the Puyallup and Nisqually Indian tribes who were intent upon retaking certain important tribal land areas back to their sovereign ownership and control (CR 1 PP. 12, 13) (CR 10 p. 8) Justice Story further ruled:

> "...By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors."

The ferocity of the military engagement undertaken by the Puyallup warriors caused the evacuation of white settlers and their military force to Fox Island and to Fort Nisqually by what is now

Steilacoom, Washington. Thus the part of the ceded territory with village sites and waterways was pervasively conquered, and occupied to the fullest extent by Indian tribal nation armed forces. Of course the laws of the United States were without meaning or relevance during this time in this said territory and it was never returned into the public domain of the United States, it being the subject of the Fox Island Council peace pact and land retrocession, whereby sovereign, jurisdiction over the soil title to this conquered and occupied territory was confirmed as being in the Puyallup Tribal nation. Thus it was taken out of the public domain of the United States in the most absolute sense. (CR 1 pp. 12 & 13) Justice Story further ruled:

> "By the surrender the inhabitants passed under a temporary allegiance to the British government and were bound by such laws, and such only, as it chose to recognize."

There is absolutely no reason to resume otherwise with respect to the non-tribal members-white settlers. And there were some who remained within the Puyallup Indian conquered and occupied territory. These persons who were very likely married to Puyallup Indians became wholly subject to Puyallup tribal laws and orders.

Justice Story further ruled:

> "Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port....[G]oods imported were in no correct sense imported into the United States. The subsequent evacuation by the enemy and resumption of authority by the United States did not and could not change the character of the previous transactions. The doctrine respecting the *jus postliminii* are wholly inapplicable to the case.';

In the case entitled *"The Diamond Rings"*, 183 U.S. 176 (1901) the court declared at page 178:

> "...Nor could territory be foreign and domestic at the same time."

Puyallup tribal nation territory as enlarged by the said retrocession is foreign, not domestic territory with respect to the United States government. Therefore the United States government has no rational and reasoned right, or power, or excuse to extend its taxing jurisdiction over the rightful national inhabitants thereof. One of which is your Appellant.

APPENDIX H
"EXTRACT FROM APPELLANT'S BRIEF 'STATEMENT OF ISSUES' "

"E. Whether the congressionally provided for Oregon Donation Act of 1848 (9 Stat. 323, Aug. 14, 1848), incorporating as applicable the Northwest Ordinance of 1787 (1 Stat. 51), expressly forbids all possible U.S. taxation of treaty Indians on their reservation activities within the territorial limits encompassed by the Oregon territory in 1848?"

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APPENDIX I
AFFIDAVIT OF SILAS V. CROSS IN
OPPOSITION TO MOTION TO DISMISS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

Silas V. Cross, *Plaintiff,* v. United States of America, and W.D. Malone, District Director of U.S. Internal Revenue Service, Seattle District, *Defendants.*	No. C90-5077B AFFIDAVIT OF SILAS V. CROSS IN OPPOSITION TO MOTION TO DISMISS

(PUYALLUP INDIAN NATION)
STATE OF WASHINGTON
COUNTY OF PIERCE ss.

I, Silas V. Cross, being first duly sworn on oath deposes and says:

I

That he makes this affidavit in support of his opposition to Defendants' motion to dismiss his Complaint for declaratory and injunctive relief.

II

That Affiant, is a citizen of the Puyallup Indian tribal nation which is sovereign and owns its own territory in sovereign, para-

mount jurisdiction over the soil title, as well as being regarded by United States statutory law as a citizen of the United States. Affiant holds no United States citizenship status pursuant to the United States Constitution being expressly excluded from the same by it.

III

That Affiant has furnished the Defendant District Director of the Internal Revenue Service for the Western District of Washington by his agents with full and complete objections in writing to the Director's claim of tax liability. Thus the same was on notice that no possible income tax is assessable against Affiant. Nonetheless the said director has not removed the threat of assessment against Plaintiff and his treaty and tribal sovereign nation protected and derived interest. Attached herewith as Attachment "A" are copies of the said correspondence.

IV

That since the end of 1976 Plaintiff has not had employment anywhere and has solely operated his trading post under direct tribal nation laws and code as a treaty and treaty nation governed activity. If Plaintiff would attempt to conduct this activity outside the scope of the said treaty, he would immediately run afoul of intensely supervised State of Washington and related Federal laws. Absolutely no non-Puyallup tribal member would be allowed for even one hour to conduct Affiant's business in the way he and other Puyallups do within their tribal nation's territory.

V

Plaintiff is an enrolled tribal member and citizen of the sovereign Puyallup Indian tribal nation under the terms of the historical aboriginal, status of his tribe, the Medicine Creek Treaty of 1854 (10 Stat. 1132), and the Fox Island Council peace pact retrocession of 1856. Affiant by U.S. statute has a status of United States citizenship (therefore he is apparently a dual citizen),

nonetheless in the circumstances he is acting at all times beyond this status. Affiant by United States law, based upon its historical and treaty time duty to protect him (and his tribal nation) is classified as a *restricted, non-competent* Indian and a ward of the United States. Moreover affiant is recognized by the United states under its laws as being in a "state of pupilage".

VI

That based on affiants considerable experience (17 years continuously) on the Puyallup tribal council including the chairmanship thereof, and his own considerable involvement and research into Puyallup tribal nation matters and affairs, he has acquired extensive knowledge of the oral traditions of his tribal nation. Therefore based on the foregoing he can explain the following about the subject treaty:

The Medicine Creek treaty of 1854 from the standpoint of the Puyallup tribe is most notable in three profound respects:

(1). It was a large land cession (over 2,600,000 acres) presently worth untold billions of dollars more than the benefits retained and received by the Puyallup Tribe.

(2). The Puyallup Tribe as well as the others were "persuaded" to restrict or limit their substantial trading activities to the dominions of the United States as they then existed or would thereafter exist. Other trading tribes east of the mountains were not so restricted however.

(3). Aboriginal rights and immunities not granted were fully understood by the Puyallup treaty signers as retained by the tribes and their members. Thus the treaty signers (in fact on both sides) understood no United States tax of any kind could or would ever be under any circumstances be imposed upon the exercise of their retained rights or against their retained immunity from United States taxation.

VII

That I have always understood that the oral traditions of the Puyallup tribe clearly manifest and "spell out" that it was not Governor Stevens' (treaty agent) intentions to either tax us on any of our various activities as of then or threafter *in futuro*. Just as importantly my tribal representatives and my people of 1854 (and to the present) have likewise always understood that our main character with respect to the surrounding white population was that so long as we lived in tribal relations we could not and would not be under the whiteman's State or United States regulations, and laws except those that actively and legally implement treaty provisions and related retained rights as these were well understood in scope and extent by all concerned as of 1854, and provided for and inhering in by said treaty. Our retained rights were considered as sacred and vested in us forever.

The United States Internal Revenue Service has no right under said treaty to revise the treaty's terms and retained related rights and immunities thereunder unilaterally, from generation to generation, even going so far as into the fourth generation, as here, because it currently for some reason sees fit to do so. No fair construction of the Internal Revenue Code allows for any supposition that Congress ever intended to impose income taxes upon Medicine Creek Treaty Indians living in tribal relations whose income was derived from exercising Treaty vested and guaranteed rights.

VIII

That it is clear that at the time of the Medicine Creek Treaty - 1854 based on the strong oral traditions and history of the Puyallups "including both upper 'Scope-am-mish' and lower 'Chuck-'al'loots' " that the tribes in the area were both numerically and militarily superior to the American forces in the area. Therefore had U.S. government taxes of any kind been sought to be imposed upon any of our regular and usual profit making activities, especially trading, it would not and could not have been tolerated

agreed to in any way. In fact over that which was perceived of by the tribes as land fraud begun a local war almost at once in 1855.

IX

That we were even taught in Indian School conducted by the U.S. Bureau of Indian Affairs that we were free of all state laws and regulations and especially taxes as well as U.S. taxes, and business regulations.

In fact the U.S. Interior Department's Bureau of Indian Affairs Branch of Education published a book (copy contained in Puyallup Tribal nation archives) in 1945 entitled "Indians of the Pacific Northwest", by Ruth Underhill Ph.D. This publication is a very informative childrens level book which discusses material pointedly based upon not only the oral tradition of this tribe but actual history of that U.S. Agency dealing with Indian Affairs of all kinds. Very important at page 208 thereof it is recorded:

> "BY 1855 THERE WERE 30,000 WHITES IN WASHINGTON AND OREGON. OREGON HAD A TERRITORIAL GOVERNMENT IN 1848. WASHINGTON IN 1853. IN 1854 WORD WENT OUT TO THE GOVERNORS OF BOTH TERRITORIES THAT INDIAN RIGHTS MUST BE BOUGHT OUT. *INDIANS MUST CHOOSE SOME PART OF THEIR TERRITORY WHERE THEY WOULD REMAIN FREE OF TAXES.* THE REST OF THE COUNTRY WOULD BE THROWN OPEN TO SETTLEMENT.

X

That the Puyallup Tribe's Constitution and By laws are authorized by the Indian Reorganization Act and have since 1970 been approved by the Secretary of the Interior. The Puyallup Tribe has never rejected said I.R.A. obviously. This Act recognized and even promotes as a matter of high Congressional policy Tribal sovereignty (Home Rule) 48 Stat 984, preamble and Sections 10, 16, 17 & 18 June, 1932.

XI

That additionally in so far as trading activies are concerned I am only exercising that right which Governor Stevens actually encouraged my direct family ancestors to keep engaging in, and which they understood was their aboriginal, God given right since time immemorial to do. The only limitation or imposition that was to be placed on it was, that, contained in Article 12 of the treaty. That all the time I was growing up it was drilled into me that we the Puyallups could fish, hunt, gamble, trade, pick berries without restrictions of any kind upon us including imposition of federal income or any other taxes on profits from these treaty activities. Not until the late 1970's over 120 years after Medicine Creek Treaty became the supreme law of the United States was there ever any assertion of income taxation authority over our vested treaty related income producing activities by the U.S. Internal Revenue Service. Yet nothing to support this had changed since 1854.

XII

That without a doubt the "power to tax is the power to destroy." *U.S. v. Rickert*, 188 U.S. 432 (1903). I am very fearful of the present U.S. taxing policy and believe that the United States government means business to tax or imprison the Puyallup tribal members into full submission to its sovereignty. By Article 8 of the Medicine Creek Treaty of 1854 I am dependent upon the United States government for my safety, welfare and protection of my treaty and national rights. Therefore I am a ward of the U.S. Government. No certificate of competency has ever heretofore issued to either me or any of my direct ancestors.

XII

In fact it is also an important part of our oral traditions that we, the Puyallups along with certain other tribes, like the Nisqually just south of us were deceived into signing the treaty with regard to the amount of land we reserved and its location. The result

was the war of 1855-56 which culminated in the Fox Island Council of 1856 with Governor Stevens (U.S. Agent). We demanded and received six square miles encompassing the entirety of Commencement Bay as well as the Puyallup river delta and south to a considerable extent. Thereafter by appropriate executive order the reservation was expanded upon until at its peak it comprised 29,000 acres. This U.S. executive order in 1857 confirmed the Fox Island Council retrocession of 1856. Thus this retroceded land left the public domain of the United States, and sovereign title was re-invested in the Puyallup tribal nation as it had owned and held this land before 1854 from time immemorial.

XIV

That neither myself nor any other Puyallup or the Puyallup tribal nation have ever received any offer or any sum of money for the threatened infringements upon our sacred, federally protected treaty rights to be free of all taxees of all kinds both State and Federal. No negotiation have ever been undertaken with the U.S. President per Article II, U.S. Const. for a modification of the Medicine Creek Treaty of 1854 whereby the tribal nation would be requested to grant away to the United States my (and other members) treaty time, retained right to be free and immune from the United States sovereign and constitutionally governed taxees. In fact and law the U.S. Constitution expressly excludes me as "Indian not taxed" from U.S. taxes.

XV

That I live on 5/8's acre of trust land in the so called Fife Valley within tribial nation sovereign territory in a mobile type home of modest means. My trading post is small, located on a back "county" road. My receipts are small and my income is small. That unless the relief I am petitioning the U.S. district Court for under its Art. III Sec. 2 U.S. Const. equity powers is granted, I will be permanently and irreparably harmed. The Defendant District Director for the Internal Revenue Service by and through

his agents is demanding pyament of an astronomical sum which I have no ability to pay whatsoever. Not even a small part thereof. My claim for freedom from U.S. income taxes are based upon direct and derived treaty rights and immunities over, which the U.S. Tax Court, an administrative court of limited jurisdiction, has no jurisdiction. My claim of said immunity from federal taxation are *sui generis*, not in any way even remotely available to most federally recognized Indians let alone any of the millions of non-Indian U.S. citizens and aliens.

XVI

Affiant is an "Indian not taxed" as that term is used in the U.S. Constitution. See Article I, Sec. 2 cl. 3 and 14th Amend. Sec. 2. As it is an accomplished fact that he is not taxed and never has been taxed under the laws of the State of Washington on activities (buying and selling making profits etc.) within his tribal nation's boundaries. The Washington Administrative Code (WAC) 458-20-*192* declares this reality:

> "Indians and Indian tribes are not subject to the sales tax upon sales to them of tangible personal property or otherwise taxable services which are made wholly within an Indian reservation."

The implementation of the above said Rule 192 is explained fully in the Washington State Department of Revenue Excise Tax bulletin (ETB) 504.08.192 which pertinent part provides:

> "2. *Records to be Kept.* Sales to Indians, when delivery is made within the Indian reservation of whose tribal rolls such Indian purchasers are duly registered, are exempt from sales tax. But to demonstrate entitlement to make such sales without collection of tax, all retailers must retain, as part of their books and records to be available for examination by the Department of Revenue as specified by RCS 82.32.070, the following for each sale:
>
> a. Name of the Indian purchaser,
>
> b. The tribial affiliation of the purchaser,

c. The Indian reservation to which or within which delivery was made, or within which retail services were rendered,
d. The dollar amount of the sale, and
e. The date of the sale.

Unless the Indian and his tribal affiliation are personally known to the retailer, the retailer must require the purchaser to present a tribal membership card issued by the tribe in which the purchaser is registered."

Affiant, is presently the holder, as he was in 1977, 1978 and 1979 of tribally issued membership card No. 4-200031. It is clear that Affiant is of the class known as "Indians not taxed", i.e not subject to State taxes, who is therefore excluded expressly from U.S. taxation by the United States Constitution.

FURTHER AFFIANT SAYETH NAUGHT

/s/ Silas V. Cross

Silas V. Cross
Affiant

Subscribed and sworn to before this 25 day of May, 1990.

/s/ Diane E. Cox
Notary Public in and for the State of Washington
residing in Puyallup. My commission expires 6-14-91.